

*United States Court of Appeals
for the Second Circuit*



APPENDIX

ORIGINAL
WITH PROOF
OF SERVICE

75-6111

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

B
PLS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

-against-

UNIVERSAL MAJOR INDUSTRIES CORP., JAMES G. DUNCAN,
TRANSAMERICAN PETROLEUM CORPORATION, ROY M. HORSEY,
BANNER OIL AND GAS FUNDS, INC., IAN McCARTNEY,
EDWARD G. GEDALECIA,

Defendants,

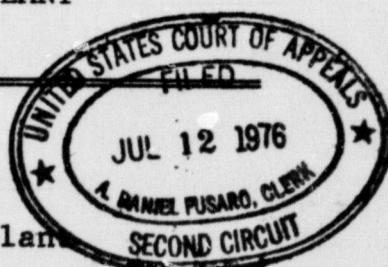
ARTHUR J. HOMANS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX OF DEFENDANT-APPELLANT

BREWER & SOEIRO
Attorneys for Defendant-Appellant
257 Park Avenue South
New York, New York 10010
(212) 777-4010



(5564)

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CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE TENNEY

Jury demand date:

73 CIV. 3626

TITLE OF CASE	ATTORNEYS
SECURITIES AND EXCHANGE COMMISSION vs.	For plaintiff: WILLIAM D. MORAN S.E.C. 26 Federal Plaza N.Y.C. 10007 264-1636
UNIVERSAL MAJOR INDUSTRIES CORP. JAMES G. DUNCAN TRANSAMERICAN PETROLEUM CORPORATION ROY M. HORSEY BANNER OIL AND GAS FUNDS INC. IAN McCARTNEY ARTHUR J. HOMANS EDWARD G. GEDALECIA	Per. Inj. 11/8/73 Per. Inj. 11/8/73 Per. Inj. 11/8/73 Per. Inj. 11/7/73 Per. Inj. 11/8/73 Per. Inj. 11/8/73 Per. Inj. 09/02/75 Per. Inc. 10/11/73
	For defendant: Brewer & Soeiro (Arthur J. Homans) 292 Madison Avenue N.Y.C. 10017 679-8091

Statistical Record

I.S. 5 mailed X

I.S. 6 08/28/75

Basis of Action:
S.E.C. ACT. 1933 & 34

CIVIL DOCKET
UNITED STATES DISTRICT COURTJUDGE TENNEY
73 CIV. 3626

Date	Proceedings
<u>Aug. 21-73</u>	<u>Filed Complaint. Issued Summons.</u>
Aug. 21-73	Filed Request of Franklin D. Ormsten for appointment to make service pursuant to Rule 4(c) of the FRCP.
Spt. 11-73	Filed deft's Arthur J. Homans Ex Parte Motion for ext. of time to, answer complaint ret. before Tenney, J.
Sep. 11-73	Filed Memo-endorsed on deft's Ex Parte Motion: The motion is granted. Deft Homans time to answer complaint is ext. to Oct. 30, 1973, & respond to pltff's motion for a preliminary injunction is ext. to 10-11-73, pltff's motion for preliminary injunction is ext. to 10-19-73, solely as to deft. Homans. Tenney, J.
Sep. 13-73	Filed summons with marshals return: Served Ian McCartney by his Wife on 9-5-73.
Oct. 11-73	Filed deft's (A.J. Homans) affidavit & show cause order ret. 10-11-73, Rm. 128 at 4:00 P.M.
Oct. 11-73	Filed consent Judgment: Ordered that deft. Edward J. Gedalecia, his, agents employees, attorneys are permanently enjoined from, directly or indirectly in the absence of any applicable, statutory exemption, etc. The court shall retain jurisdiction in, this matter for all purposes. Tenney, J. Judg. Ent. Clerk., Mailed notice Ent. 10-11-73.
Oct. 15-73	Filed Summons with Marshal's return; Unexecuted. Moved in April. No forwarding address. - 8/28/73.
Oct. 26-73	Filed Memorandum in opposition to Motion of Deft. Homans to dismiss complaint for failure to state a claim upon which relief can be granted.

CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE TENNEY
73 CIV. 3626

Date	Proceedings
Nov. 5-73	Filed Deft. Arthur J. Homans Affdvt & Notice of Motion directing evidentiary hearing for purpose of determining facts involved in claim under Sec. 5, Securities Act, etc., as indicated ret. 11/12/73.
Nov. 8-73	Filed Consent Judgment of Permanent Injunction of Transamerican Petroleum Corporation TENNEY, J. JUDGMENT ENT. (n/m) ENT. 11/8/73.
Nov. 8-73	Filed Consent Judgment of Permanent Injunction of Roy M. Horsey. TENNEY, J. JUDGMENT ENT. CLERK (n/m) ENT 11/8/73
Nov. 8-73	Filed CONSENT JUDGMENT OF PERMANENT INJUNCTION OF Banner Oil and Gas Funds Inc. TENNEY, J. JUDGMENT ENTERED CLERK (n/m) ENT. 11/8/73
Nov. 8-73	FILED CONSENT JUDGMENT of PERMANENT INJUNCTION of Ian McCartney. TENNEY, J. JUDGMENT ENTERED. CLERK (n/m) ENT. 11/8/73
Nov. 8-73	Filed CONSENT JUDGMENT OF PERMANENT INJUNCTION OF James G. Duncan. TENNEY, J. JUDGMENT ENTERED CLERK (n/m) ENT. 11/8/73
Nov. 8-73	Filed CONSENT JUDGMENT OF PERMANENT INJUNCTION OF Universal Major Industries Corp. TENNEY, J. JUDGMENT ENTERED CLERK. (n/m) ENT. 11/8/73
Nov. 12-73	Filed Memorandum of Law in support of Deft. Homans' Motion to dismiss Complaint under Rule 12(n)(6) and in opposition to Pltff's Motion for Temporary injunction under Rule
Nov. 14-73	Filed MEMORANDUM OPINION #40006. Case on motion of deft. Arthur Homans to dismiss complaint for failure to state a cause of action. Complaint contains sufficient allegation to allow SEC to establish <u>prima facie</u> case. Motion is dismissed. So Ordered. Tenney, J. (n/m).

CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE TENNEY
73 CIV. 3626

Date	Proceedings
Nov. 13-73	Before Tenney, J. with non-jury. Preliminary injunction. Hearing begun.
Nov. 14-73	Hearing cont'd and adjourned until 12/20/73.
Nov. 27-73	Filed ANSWER of Deft. Arthur J. Homans B & S
Dec. 5-73	Filed Transcript of Record of proceedings dated 9/21/73
Dec. 20-73	Hearing continued and adjourned Sine Die
Jan. 28-74	Filed transcript of record of proceedings dated 12/20/73
Feb. 15-74	Hearing cont. and adjourned sine die
Jan. 28-74	Filed Affdvt of Acknowledgment by R.M.Horsey on 12/11/73 with copy(certified) of Consent Judgment of Permanent Injunction on 11/8/73
Jan. 28-74	Filed Affdvt of Acknowledgment by I. McCartney on 12/17/73 of above papers.
Apr. 9-73	Filed Affdvt of Acknowledgment of E.J. Gedalecia of Consent Judgment of Permanent Injunction (certified copy)
5/9/74	Filed transcript of record of proceedings dated 11/14/74
6/20/74	Filed transcript of record of proceedings dated 2/15/74
Jun 24-74	Hearing contd and concluded. Decision reserved.
Aug. 26-74	Filed Brief in support of Pltff's proposed findings of facts & conclusions of law.
Aug. 26-74	Filed Pltffs Proposed Findings of Fact and Conclusions of Law.

CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE TENNEY
73 CIV. 3626

Date	Proceedings
Sep. 6-74	Filed Pltff's Reply Brief and Argument on Facts and Law
Sep. 9-74	Filed Deposition of Mr. Perlmutter & Mr. Brewer on 8/24/74 (nm)
Oct. 4-74	Filed Affdvt of Acknowledgment by James G. Duncan of certified copy of Consent Judgment of Permanent Injunction on 12/28/73 against Deft. Banner Oil & Gas Funds, Inc.
Oct. 4-74	Filed Affdvt of Acknowledgment by James G. Duncan of certified copy of Consent Judgment of Permanent Injunction against Deft. Universal Major Industries Corp. on 12/28/73
Oct. 4-74	Filed Affdvt of Acknowledgment by James G. Duncan of certified copy of Consent Judgment of Permanent Injunction on 12/28/73.
Oct. 4-74	Filed Affdvt of Acknowledgment by James G. Duncan of certified copy of Consent Judgment of Permanent Injunction against Transamerican Petroleum Corp. on 12/28/73.
05-21-75	Filed Pltff's Notice to take deposition on oral exam of Deft. James G. Duncan.
06-16-75	Filed interrogs to deft. J.G. Duncan
07-14-75	Filed OPINION #42786. Court shall issue an injunction against deft embodying terms requested by S.E.C. SUBMIT ORDER ON 10 DAYS NOTICE. Tenney, J(nm)
07-14-75	Filed Proposed Findings submitted on behalf of deft. Arthur J. Homans (deft)
07-14-75	Filed Deft. A.J. Homans Post-trial Memorandum of Law.

CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE TENNEY
73 CIV.3626

Date	Proceedings
07-14-75	Filed Post Trial Reply Memorandum of Deft. A.J.Homans
07-01-75	Filed Deft. Arthur J.Homans Affdvt & Notice of Motion re: consideration of proposed counter-order submitted in opposition to order submitted for settlement by pltff, etc. ret.8/5/75
08-05-75	Filed Pltffs Memorandum in opposition to deft. Homans motion with respect to entry of Commissions proposed Final Judgment of Permanent Injunction against said Deft.
08-28-75	Filed pltff's Final Judgment of Permanent Injunction. Ordered that deft. Arthur J.Homans, etc. are permanent enjoined from directly & indirectly in absence of any applicable statutory exemption, violating, etc. Sec.5(a) SEC Act,1933 as indicated. Tenny, J. JUDGMENT ENTERED. Clk. (mn) Ent.9/2/75
08-29/75	Filed Memo End. on motion of 8/1/75. Hearing reopened on 8/12/75. Pltff's proposed order herein was signed on 8/28/75. Instant proposed counter-order was not signed. So Ordered. Tenney, J. (mn)
09-22-75	Filed Affdvt of Acknowledgment by Arthur J.Homans (Deft) of certified copy of Final Judgment of Permanent Injunction on 9/16/75.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x

SECURITIES AND EXCHANGE COMMISSION,	:	UNITED STATES DISTRICT COURT
Plaintiffs,	:	SOUTHERN DISTRICT OF NEW YORK
-against-	:	CASE NO. 73 CIV. 3626
UNIVERSAL MAJOR INDUSTRIES CORP.,	:	USCA 75-6111
JAMES G. DUNCAN,	:	
TRANSAMERICAN PETROLEUM CORPORATION,	:	
ROY M. HORSEY	:	Judge Tenney
BANNER OIL AND GAS FUNDS, INC.	:	
IAN McCARTNEY,	:	
ARTHUR J. HOMANS,	:	
EDWARD G. GEDALECIA,	:	
Defendants.	:	

-----x

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SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JUDGE TENNEY

Civil Action File No. 73 CIV. 3626

SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff :

v

UNIVERSAL MAJOR INDUSTRIES CORP. :

JAMES G. DUNCAN :

TRANSAMERICAN PETROLEUM CORPORATION :

ROY M. HORSEY :

SUMMONS

BANNER OIL AND GAS FUNDS, INC. :

IAN McCARTNEY :

ARTHUR J. HOMANS :

EDWARD G. GEDALECIA :

Defendants. :

To the above named Defendant

You are hereby summoned and required to serve upon

WILLIAM D. MORAN
Regional Administrator
Securities and Exchange
Commission

plaintiff's attorney, whose address

26 Federal Plaza
New York, New York, 10007

an answer to the complaint which is herewith served upon you,
within 20 days after service of this summons upon you exclusive
of the day of service. If you fail to do so judgment by default
will be taken against you for the relief demanded in the complaint.

RAYMOND F. BURGHARDT

Date: August 21, 1973

Clerk of Court

s/

Deputy Clerk

(Seal of Court)

NOTE:- This summons is issued pursuant to Rule 4 of the
Federal Rules of Civil Procedure.

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

73 Civil 3626

UNIVERSAL MAJOR INDUSTRIES CORP.,
JAMES G. DUNCAN
TRANSAMERICAN PETROLEUM CORPORATION
ROY M. HORSEY
BANNER OIL AND GAS FUNDS, INC.,
IAN McCARTNEY
ARTHUR J. HOMANS
EDWARD G. GEDALECIA,

Defendants.

-----X

Plaintiff, Securities and Exchange Commission ("Commission")
for its Complaint herein, alleges:

1. Defendants Universal Major Industries Corp., James G. Duncan, Transamerican Petroleum Corporation, Roy M. Horsey, Banner Oil and Gas Funds, Inc., Ian McCartney, Arthur J. Homans and Edward G. Gedalecia, have been engaged, are engaged, and will, unless enjoined, continue to engage in acts and practices which constitute and aid and abet violations of Sections 5(a) and 5(c) of the Securities Act of 1933, as amended ('Securities

COMPLAINT

Act"), 15 U.S.C. 77e(a) and 77e(c).

2. Defendants Universal Major Industries Corp., James G. Duncan, Roy M. Horsey, and Ian McCartney, have been engaged, are engaged, and will, unless enjoined, continue to engage in acts and practices which constitute and aid and abet violations of Section 17(a) of the Securities Act, 15 U.S.C. 77q(a) and Section 10(b) of the Securities Exchange Act of 1934, as amended ("Exchange Act"), 15 U.S.C. 78j(b) and Rule 17 C.F.R. 240.10b-5 thereunder.

3. The Commission, pursuant to Section 20(b) of the Securities Act, 15 U.S.C. 77t(b) and Section 21(e) of the Exchange Act, 15 U.S.C. 78u(e), brings this action to enjoin such acts and practices.

4. This Court has jurisdiction of this action under Section 22(a) of the Securities Act, 15 U.S.C. 77v(a) and Section 27 of the Exchange Act, 15 U.S.C. 78aa.

5. Pursuant to authority conferred upon the Commission by Section 10(b) and Section 23(a) of the Exchange Act, 15 U.S.C. 78j(b) and 78w(a), the Commission has promulgated Rule 10b-5; said rule was in effect at all times mentioned herein and is now in effect.

COMPLAINT

DEFENDANTS

6. Defendant Universal Major Industries Corp. ("UMI") is a Nevada corporation. It engages in the development and exploration of oil and gas property interests. Its offices are located at Hidden Valley Ranch, Kingston, New York.

7. Defendant James G. Duncan ("Duncan") is the president, a director and substantial stockholder in UMI. He resides at Hidden Valley Ranch, Kingston, New York.

8. Defendant Transamerican Petroleum Corporation ("Transamerican") is a corporation. It is controlled by its sole stockholder, Duncan. Its offices are located at Hidden Valley Ranch, Kingston, New York.

9. Defendant Roy M. Horsey ("Horsey") is the Chairman of the Board and Chief Executive Officer of UMI. He is also a substantial shareholder of UMI. He resides at 1010 Lake Street, Oak Park, Illinois 60301.

10. Defendant Banner Oil and Gas Funds, Inc., ("Banner") is a Maryland corporation. It is a wholly owned subsidiary of UMI. Its offices are located at Hidden Valley Ranch, Kingston, New York.

11. Defendant Ian McCartney ("McCartney") is an employee of Banner. He resides at 2800 East Sunrise Boulevard,

COMPLAINT

Fort Lauderdale, Florida.

12. Defendant Arthur J. Homans ("Homans") is an attorney admitted to practice in New York State. He has been general counsel to UMI since 1967. His offices are located at 122 East 42nd Street, New York, New York.

13. Defendant Edward G. Gedalecia ("Gedalecia") was a member of the law firm of Aberson, Gedalecia and Chikofsky ("Aberson firm"). The firm acted as special counsel to UMI from February, 1968 through August, 1971. For the past eighteen months, Gedalecia has engaged in his own law practice at 40 Exchange Place, New York, New York.

FIRST CAUSE OF ACTION

SECTIONS 5(a) AND 5(c) OF THE SECURITIES ACT, 15 U.S.C. 77e(a) and 77e(c) -- OFFER AND SALE AND DELIVERY AFTER SALE OF UNREGISTERED SECURITIES OF UMI

14. From on or about November, 1966 and continuing to the date hereof, in the Southern District of New York and elsewhere, defendants UMI, Duncan, Transamerican, Horsey, Banner, McCartney, Homans and Gedalecia, singly and in concert, directly and indirectly, have been offering for sale, selling and delivering after sale securities, namely 6% convertible debentures of UMI, 7% convertible debentures of UMI and common stock of UMI and have

COMPLAINT

been and are causing and inducing the offer, sale and delivery after sale of these securities. No registration statement has been filed or been in effect with respect to these securities as required by the Securities Act.

15. In connection with these transactions, these defendants have been and are, directly and indirectly, making use of the means and instruments of transportation or communication in interstate commerce and of the mails to offer to sell and to sell securities of UMI, and have been and are, directly and indirectly, carrying and causing to be carried such securities through the mails and interstate commerce, by the means and instruments of transportation, for the purpose of sale and delivery after sale.

16. As part of the above activities; (a) between April 1967 and December 1968, UMI issued approximately \$3,500,000 of its 6% unregistered convertible debentures to approximately 425 persons, and between November 1966 and November 1968, UMI issued approximately \$440,000 of its 7% unregistered convertible debentures to approximately 26 persons; (b) between May 16, 1968 and February 19, 1971, approximately 250 UMI debentureholders received 1,100,000 shares of unregistered UMI common stock on conversion of their 6% and 7% debentures; (c) between August

COMPLAINT

15, 1969 and June 15, 1971, approximately 300 UMI debentureholders received approximately 270,000 shares of unregistered UMI common stock in lieu of cash as interest on their debentures; (d) between January 13, 1969 and December 15, 1972, UMI issued approximately 850,000 shares of unregistered UMI common stock to approximately 100 persons for a total consideration of nearly one million dollars; (e) between October 15, 1967 and February 15, 1973, Duncan sold approximately 345,000 of his own shares of unregistered UMI common stock to approximately 60 persons and caused Transamerican to sell approximately 475,000 of its own shares of unregistered UMI common stock to approximately 36 persons. The proceeds from these sales amounted to approximately \$500,000; (f) between September 15, 1967 and February 15, 1973, Horsey sold approximately 190,000 of his own shares of unregistered UMI common stock to approximately 74 persons for a total consideration of approximately \$100,000; and (g) between April 1, 1972 and May 30, 1972, UMI has issued approximately 470,000 shares of unregistered UMI common stock to approximately 48 persons in exchange for fractional interest participations in Banner drilling programs.

17. All unregistered common stock of UMI was issued in conjunction with various opinions of counsel as to the legality of the transactions. The opinions were rendered by the defendant

COMPLAINT

Homans and the Aberson firm. The defendant Gedalecia acted on behalf of the Aberson firm in this regard. Each such opinion of counsel rendered by Homans or the Aberson firm represented that the issuance of UMI common stock to which the opinion pertained, was exempt from registration under the Securities Act pursuant to either Section 3(a)(9) or 4(2). In fact, the aforementioned offers, sales, and delivery after sales of UMI securities were not exempt under Section 3(a)(9) or 4(2), or any other section of the Securities Act, which fact the defendants Homans and Gedalecia knew, or in the exercise of reasonable care should have known.

18. By reason of the foregoing, defendants UMI, Duncan, Transamerican, Horsey, Banner, McCartney, Homans and Gedalecia, have, singly and in concert, directly and indirectly, violated and aided and abetted violations of Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. 77e(a) and 77e(c).

SECOND CAUSE OF ACTION

SECTION 17(a) OF THE SECURITIES ACT, 15 U.S.C.
77q(a) AND SECTION 10(b) OF THE EXCHANGE ACT, 15
U.S.C. 78j(b) AND RULE 17 C.F.R. 240.10b-5 THERE-
UNDER--FRAUD IN THE OFFER, PURCHASE AND SALE OF
UMI SECURITIES.

19. Plaintiff Commission realleges and incorporates by reference each and every allegation contained in paragraph 1-18 of this Complaint.

COMPLAINT

20. During the period from 1968 to the date hereof, in the Southern District of New York and elsewhere, defendants UMI, Duncan, Horsey and McCartney, singly and in concert, directly and indirectly, in connection with the offer, purchase and sale of the securities of UMI, by the use of the means and instruments of transportation or communication in interstate commerce and of the mails, have employed and are employing devices, schemes or artifices to defraud the purchasers and sellers of UMI securities, have engaged and are engaging in acts, practices, transactions and courses of business which have operated, are operating and will operate as a fraud and deceit upon the purchasers and sellers of UMI securities, and have obtained and are obtaining money and property by making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, concerning, among other things:

- (a) the financial condition of UMI;
- (b) the present and prospective value of the securities of UMI;
- (c) the prospective earnings of UMI;
- (d) the proposed operations of the company; and

COMPLAINT

(e) the property rights of a company which
is to be merged with UMI.

21. As part of the above activities, from 1968 to the date hereof, defendants UMI, Duncan, Horsey and McCartney disseminated and caused to be disseminated false and fraudulent information and caused to be made false and fraudulent representations to prospective investors and others, including, but not limited to, the following:

- (a) that UMI would earn \$1 per share when there was no basis in fact for such an earning projection;
- (b) a prediction that the price of UMI common stock would rise to \$20. per share when there was no basis in fact for such a prediction;
- (c) that UMI had net sales of \$342,000 and an operating profit of \$188,000 for the six months ended March 31, 1971 when, in fact, the company did not have such profits and sales for the six month period ending March 31, 1971;
- (d) that the company had scheduled a program of core drilling at a time when the company was financially incapable of performing such an operation; and

COMPLAINT

(e) that UMI intended to merge with a company called DAL Petroleum Company ("DAL") which owned rights to a substantial block of acreage lying off-shore of Alaska in international waters beyond the 12 mile limit when, in fact, DAL did not own such rights.

22. By reason of the foregoing, defendants UMI, Duncan, Horsey and McCartney, have, singly and in concert, directly and indirectly, violated and aided and abetted violations of Section 17(a) of the Securities Act, 15 U.S.C. 77q(a), Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b) and Rule 17 C.F.R. 240.10b-5 thereunder.

WHEREFORE, plaintiff Commission respectfully demands:

A. A Preliminary Injunction and a Final Judgment of Permanent Injunction, enjoining defendants UMI, Duncan, Trans-american, Horsey, Banner, McCartney, Homans and Gedalecia, their officers, directors, agents, employees, attorneys, successors, assigns and those persons in active concert or participation with them, and each of them, directly or indirectly, in the absence of any applicable statutory exemption from:

(1) Making use of any means or instruments of

COMPLAINT

transportation or communication in interstate commerce or of the mails to offer to sell, through the use or medium of any prospectus or otherwise, the securities of Universal Major Industries Corp., or any other securities, unless and until a registration statement has been filed with the Commission as to such securities;

(2) Making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell, through the use or medium of any prospectus or otherwise, the common stock of Universal Major Industries Corp., or any other securities, unless and until a registration statement is in effect with the Commission as to such securities;

(3) Carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, the securities of Universal Major Industries Corp., or any other securities, for the purpose of sale or delivery after sale, unless and until a registration

COMPLAINT

statement is in effect with the Commission as to such securities.

B. A Preliminary Injunction and a Final Judgment of Permanent Injunction, enjoining defendants UMI, Duncan, Horsey and McCartney, their officers, directors, agents, employees, attorneys, successors, assigns, and those persons in active concert or participation with them, and each of them, directly and indirectly, in connection with the offer for sale, sale, offer to purchase or purchase of securities of Universal Major Industries Corp., or any other securities, by the use of any of the means and instruments of transportation or communication in interstate commerce, or of the mails, or of any facility of any national securities exchange from:

- (1) Employing any device, scheme or artifice to defraud;
- (2) Making any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
- (3) Engaging in any act, practice or course of

COMPLAINT

business which operates or would operate as a
fraud or deceit upon any person.

C. Such other and further relief as to the Court may
seem just and proper.

Dated: New York, New York
August 21, 1973

Respectfully submitted,

s/ William D. Moran
WILLIAM D. MORAN
Regional Administrator
Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
26 Federal Plaza
New York, New York, 10007
Telephone No.: 212-264-1636

Of Counsel
WILLIAM NORTMAN
FRANKLIN D. ORNSTEN
STUART PERLMUTTER
JEFFREY TUCKER

ANSWER OF DEFENDANT HOMANS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SAME TITLE

73 Civil 3625
CH.H.T.

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Defendant, Arthur J. Homans ("Homans"), for his answer to the complaint herein, by Brewer and Soeiro, his attorneys, alleges:

1. Denies each and every allegation contained in Paragraph "1" of the complaint, insofar as it relates to Homans.

2. Denies any knowledge or information sufficient to form a belief concerning the allegations of Paragraph "2" of the complaint, and denies that said allegations relate to him.

Answering the First Cause of Action

3. Denies each and every allegation of Paragraph "14" of the complaint, and, in particular, denies that he at any time engaged in the sale or offer, singly or in concert with any of the co-defendants of 6% convertible debentures, 7% convertible debentures or common stock of defendant, U.M.I.

ANSWER OF DEFENDANT HOMANS

4. Denies each and every allegation contained in Paragraph "15".

5. Denies any knowledge or information sufficient to form a belief concerning the allegations of Paragraph "16".

6. Denies each and every allegation of Paragraph "17", except admits that he did render a limited number of opinions concerning the exemption from the federal registration requirements of certain of the transactions referred-to.

7. Denies each and every allegation contained in Paragraph "18" of the complaint.

As and for a First Defense

8. Homans did not, at any time, render opinions as to the legality or propriety of the sale or offer to sell of any 6% convertible debentures or 7% convertible debentures of U.M.I., and at no time did he participate in any way in any such transactions.

As and for a Second Defense

9. In or about October 1967, defendant, Gedalecia was retained by defendant, U.M.I. as its Special Counsel for federal securities law matters. He continued as such Special Counsel through approximately August 1971.

ANSWER OF DEFENDANT HOMANS

10. In connection with his services as Special Counsel, Gedalecia on March 11, 1968, rendered an opinion to defendant, U.M.I. concerning the propriety and legality of issuing unregistered common stock of U.M.I. upon conversion of its outstanding debentures.

11. In connection with his services as Special Counsel, Gedalecia later rendered another opinion to U.M.I. as to the propriety and legality of issuing unregistered common stock in payment of, and in lieu of, interest on the outstanding debentures.

12. Homans rendered no opinion concerning either type of transaction described in paragraphs 10 and 11 above. He merely transmitted the relevant opinion of Gedalecia to the corporate transfer agent and advised it that the corporation was relying on Gedalecia's opinion in requesting the transfer in question in each case. Homans believed each opinion by Gedalecia thus transmitted by him to be the honest and true expert opinion of Gedalecia and to have been reasonably and competently rendered. Homans was not aware of any facts or circumstances which caused him to doubt the reasonableness or validity of any such opinion by Gedalecia. He believed it was reasonable and proper for U.M.I. to rely upon those opinions.

ANSWER OF DEFENDANT HOMANS

As and for a Third Defense

13. The opinions actually rendered by this defendant were not rendered in connection with a public offering or distribution of any shares of common stock of U.M.I.

14. All of the shares of common stock referred to in the complaint as having been issued or sold by U.M.I. or sold by defendants Horsey and Duncan and which were the subject of true opinions rendered by Homans were sold in separate and distinct private sales over a period of nearly four years. In the case of each opinion rendered by him, Homans gave his honest opinion and believed it to be an accurate application of the law to the facts involved.

15. Each purchaser of such common stock, in connection with such purchase, signed a so-called "investment letter" prior to the delivery of any stock to him in which he represented that he had acquired the stock for investment; that he had no present intention to sell or distribute the same; and that he had acquired the shares in a private transaction.

16. Each certificate of common stock issued by the Transfer Agent in any such transaction was stamped with an appropriate legend restricting further transfer except under

ANSWER OF DEFENDANT HOMANS

applicable regulation of the Commission and notifying the holder that a corporate "stop order" had been placed with the transfer agent against further transfer except with the consent of U.M.I. and of its counsel.

17. None of the shares of common stock issued under opinions rendered by Homans was thereafter resold in broker's transactions without legend so as to enter the investment market as so-called "free-trading" shares or to be publicly traded; except for one or two instances involving special circumstances and an appropriate "holding period," or upon issuance of a "no-action" letter by the Commission upon application of the shareholder, or in compliance with and pursuant to SEC Rule 144 after the effective date thereof, i.e., April 15, 1972.

18. By reason thereof, the transactions in which this defendant actually rendered opinions were exempt under Section 4(1) or Section 4(2) of the Securities Act of 1933; and Homans believed the transaction to be so exempt in the case of each such transaction.

WHEREFORE, defendant, Arthur J. Homans, respectfully demands judgment dismissing the complaint as to said defendant or in his favor on the merits herein.

ANSWER OF DEFENDANT HOMANS

BREWER & SOEIRO

by: s/ Bradley R. Brewer
Bradley R. Brewer
A Member of the Firm
Attorneys for Defendant
Arthur J. Homans
292 Madison Avenue
New York, N. Y. 10017
(212) 679-8091

NOTICE OF MOTION FOR PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SAME TITLE

73 Civil 3626

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S I R S:

PLEASE TAKE NOTICE that upon the Summons, Complaint,
Affidavit of John R. Filmore, and all other papers and exhibits
in support thereof, the undersigned will move this Court at
Room 2704, United States Courthouse, Foley Square, City of
New York, on the 19th day of September, 1973 at 2:00 o'clock in
the afternoon of that day or as soon thereafter as counsel can
be heard as follows:

For an Order of Preliminary Injunction under Rule 65
of the Federal Rules of Civil Procedure enjoining the defendants
Universal Major Industries Corp., James G. Duncan, Transamerican
Petroleum Corporation, Roy M. Horsey, Banner Oil and Gas Funds,
Inc., Ian McCartney, Arthur J. Homans and Edward G. Gedalecia,
their officers, directors, agents, employees, attorneys, successors,
assigns and those persons in active concert or participation
with them, and each of them, from further violations of Sections
5(a) and 5(c) of the Securities Act of 1933, as amended, 15 U.S.C.

NOTICE OF MOTION FOR PRELIMINARY INJUNCTION

77e(a) and 77e(c) and enjoining the defendants Universal Major Industries Corp., James G. Duncan, Roy M. Horsey, and Ian McCartney, their officers, directors, agents, employees, attorneys, successors, assigns and those persons in active concert or participation with them, and each of them, from further violations of Section 17(a) of the Securities Act of 1933, as amended, 15 U.S.C. 77q(a) and Section 10(b) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78j(b) and Rule 17 C.F.R. 240.10b-5 thereunder and for such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to General Rule 9(c) (2) of this Court, you are required to serve upon the undersigned all opposing affidavits and answering memoranda at least three (3) days before the return day.

Dated: New York, New York
August 21, 1973

Respectfully submitted,

s/ William D. Moran
WILLIAM D. MORAN
Regional Administrator
Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
26 Federal Plaza
New York, New York 10007
Telephone No. (212) 264-1636

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SAME TITLE

73 Civil

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STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

JOHN R. FILMORE, being duly sworn, deposes and says:

1. I am employed by the Securities and Exchange Commission ("Commission") as a securities investigator in its New York Regional Office, New York, New York. I submit this affidavit in support of the Commission's motion for a preliminary injunction against defendants Universal Major Industries Corp. ("UMI"), James G. Duncan ("Duncan"), Transamerican Petroleum Corporation ("Transamerican"), Roy M. Horsey ("Horsey"), Banner Oil and Gas Funds, Inc. ("Banner"), Ian McCartney ("McCartney"), Arthur J. Homans ("Homans") and Edward G. Gedalecia ("Gedalecia"), to enjoin them from further violations of Sections 5(a) and 5(c) of the Securities Act of 1933, as amended, (Securities Act") 15 U.S.C. 77e(a) and 77e(c) and against defendants UMI, Duncan, Horsey and McCartney, to enjoin them from further violations of Section 17(a) of the Securities Act, 15 U.S.C. 77q(a) and Section 10(b) of the Securities Exchange Act

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

of 1934, as amended ("Exchange Act"), 15 U.S.C. 78j(b) and Rule 17 C.F.R. 240.10b-5 thereunder.

2. I am familiar with the facts alleged in the Commission's complaint and the facts set forth hereafter and have participated in the investigation of this matter. I make this affidavit on information and belief, the source of my information and the grounds for my belief being documents in the possession of the Commission which relate to this matter, documents and records in the possession of certain of the defendants and other persons, interviews with defendants and other persons and conversations with other members of the staff having familiarity with this matter.

DEFENDANTS

3. UMI is a Nevada corporation with its principal offices at Hidden Valley Ranch, Kingston, New York. It is engaged principally in the development and exploration of oil and gas property interests. As of February 15, 1973 UMI had 5,184,978 shares of common stock issued and outstanding. The company's stock is traded in the over-the-counter market.

4. Duncan is the president, a director and substantial shareholder in UMI. Since 1967, he has actively participated in the sales of unregistered UMI securities. He resides at Hidden

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Valley Ranch, Kingston, New York.

5. Transamerican is an inactive corporation with its office at Hidden Valley Ranch, Kingston, New York. It is controlled by its sole shareholder, Duncan, who caused Transamerican to sell unregistered UMI securities.

6. Horsey is the Chairman of the Board, Chief Executive Officer and substantial shareholder of UMI. He has been instrumental in effecting the distribution of unregistered UMI securities. He resides at 1010 Lake Street, Oak Park, Illinois, 60301.

7. Banner is a Maryland corporation with its offices at Hidden Valley Ranch, Kingston, New York. It is a wholly owned subsidiary of UMI. It owns 25% of three drilling ventures in Pennsylvania. The remaining 75% of each venture was offered and sold to the public pursuant to an offering under Regulation B of the Securities Act. 1/

1/ Regulation B, 17 C.F.R. 230.300, et seq., provides a method for obtaining an exemption from the requirements of registration relating to the offer and sale of fractional undivided interests in oil and gas rights if certain conditions are met and the rules of the Regulation are followed.

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

8. McCartney is an employee of Banner. In addition to his duties with Banner, McCartney has assisted in the sale of unregistered securities of UMI. McCartney resides at 2800 E. Sunrise Boulevard, Fort Lauderdale, Florida.

9. Homans has been general counsel to UMI since 1967. He has assisted in the sale of unregistered securities of UMI by rendering legal opinions that certain transactions pertaining to the issuance, sale and exchange of UMI common stock were exempt from registration under the Securities Act. His offices are located at 122 East 42nd Street, New York, New York.

10. Gedalecia was a member of the law firm of Aberson, Gedalecia and Chikofsky ("Aberson firm"). The firm acted as special counsel to UMI for the period February 1968 through August 1971 and was retained for the purpose of preparing registration statements under the Securities Act and the Exchange Act. Gedalecia is currently engaged in his own law practice at 40 Exchange Place in New York City. Gedalecia has assisted in the sale of unregistered securities of UMI by causing the Aberson firm to render legal opinions that certain transactions pertaining to the issuance, sale and exchange of UMI common stock were exempt from registration under the Securities Act.

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

A. DISTRIBUTION OF UMI UNREGISTERED SECURITIES

I. PRIMARY DISTRIBUTION

(a) 6% CONVERTIBLE DEBENTURES

11. Prior to 1966, the year Duncan became associated with UMI, Duncan organized a series of joint ventures which were formed for the purpose of developing oil and gas wells located in Ohio, Pennsylvania and New York.

12. Duncan and/or Transamerican acted as general manager of the ventures and received, as partial compensation for their duties, fractional interests in the oil and gas wells. The remaining fractional interests in the oil and gas wells were sold to investors by Duncan.

13. In the period from 1966 to 1969 Duncan and Transamerican engaged in a series of corporate transactions including the transfer of their fractional interests to UMI by which they received approximately 900,000 shares of UMI common stock and UMI 6% convertible debentures with a face amount of approximately \$900,000. In connection with the foregoing transactions, Duncan had gained effective control of UMI as of October 1966.

14. Having thus gained control of UMI, Duncan sought to acquire, on behalf of UMI, the fractional interests in the oil and gas wells he had sold in the joint venture formed prior to 1966.

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

15. Between April 1967 and December 1968, UMI issued approximately \$3,500,000 of its 6% convertible debentures to approximately 425 persons in payment for their fractional interest in the oil and gas wells.

16. The 425 investors resided throughout the United States in approximately 20 states including New York, Kentucky, Illinois, Iowa, California and Washington.

17. A substantial number of these investors knew little about the operations of UMI, its financial condition or other facets of its business.

18. The sale of the UMI 6% convertible debentures was accomplished chiefly through the efforts of Duncan and Horsey who actively solicited investors to exchange their fractional interests in oil and gas wells for the UMI 6% convertible debentures.

(b) 7% CONVERTIBLE DEBENTURES

19. UMI also sold 7% convertible debentures to approximately 26 investors for a total consideration of approximately \$440,000.

20. The sale of the 7% convertible debentures were made between November 1966 and November 1968 to officers and directors of UMI and certain other persons.

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

(c) UMI COMMON STOCK

1. Issued on Conversion of 6% and 7% Debentures
and in Lieu of Cash as Interest Payments

21. Having issued approximately \$4,400,000 of 6% convertible debentures to Duncan and the 425 holders of fractional interests in joint ventures formed by Duncan prior to 1966 and having issued \$440,000 of 7% convertible debentures to 26 investors, UMI was confronted with an annual interest liability of approximately \$300,000 which it was unable to meet.

22. In order to alleviate the problem posed by an inability to make interest payments on debentures, UMI contacted debentureholders both orally and by mail urging them to either convert their debentures into common stock or accept common stock in lieu of cash as payment of interest on the debentures.

23. As a result of the foregoing, from on or about May 16, 1968 to on or about February 19, 1971 approximately 250 debentureholders received 1,100,000 shares of UMI common stock on conversion of their 6% and 7% debentures, and from on or about August 15, 1969 to on or about June 15, 1971 approximately 300 debentureholders received approximately 270,000 shares of common stock of UMI in lieu of cash as interest on their debentures.

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2. Issued in Exchange for Cash, Services and Properties

24. In addition to the issuance of UMI common stock for conversion and interest on debentures as noted in paragraph 23 above, UMI issued its common stock in exchange for cash, services and the acquisition of certain oil and gas properties.

25. From on or about January 13, 1969 to on or about December 15, 1972, UMI issued approximately 850,000 shares of common stock to approximately 100 persons for a total consideration of cash, services and properties valued at nearly \$1,000,000.

26. Although most of the 100 investors who acquired the common stock were friends or business associates of the officers, directors and employees of UMI, they knew little about the operations of UMI, its financial condition or other facets of its business.

27. The offer and sale of UMI common stock was accomplished chiefly through the efforts of Duncan, Horsey and McCartney.

3. Issued in Exchange for Banner Fractional Interests

28. In 1970 and 1971, Banner, the wholly owned subsidiary of UMI, sold fractional interest participations in three offerings filed pursuant to Regulation B of the Securities Act. A total of 88 persons invested \$300,000 for their participations

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

in the three offerings.

29. The three offering sheets 2/ utilized by Banner in the sale of the fractional interests contained representations that UMI or Banner had the right to make a tender offer to the purchasers of Banner participations whereby shares of UMI common stock would be tendered in exchange for fractional interests outstanding. The offering sheets further stated that within 13 months from the date of the offerings, UMI would take "such steps in compliance with the regulations of the Securities and Exchange Commission as may be necessary to make a valid tender offer... which shares of common stock to be issued shall be duly registered with the Securities and Exchange Commission without costs to the participants."

30. The Banner participations were sold primarily by McCartney to the 88 individuals. Pursuant to the terms of the offering, approximately 48 investors have exchanged their interests in Banner for approximately 470,000 shares of UMI common stock.

2/ Offering sheets are the documents which companies issuing securities pursuant to Regulation B are required to furnish investors. Their purpose is to provide investors with the requisite information to make an informed investment decision.

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

31. However, no filing has ever been made with the Commission pursuant to the tender offer or registration provisions of the federal securities laws and the 470,000 shares of UMI common stock issued in exchange for the fractional interests in Banner have never been registered with the Commission.

32. Many of the investors who exchanged their interests in Banner for shares of UMI common stock knew little about the operations of UMI, its financial condition or other facets of its business.

33. Thus, from approximately November 1966 to December 15, 1972 the defendants in this action engaged in an unregistered distribution of approximately \$3,500,000 of UMI's 6% convertible debentures to approximately 425 persons, \$440,000 of UMI's 7% convertible debentures to approximately 26 persons and 2,700,000 shares of UMI common stock to approximately 600 persons.

II. SECONDARY DISTRIBUTION--RESALES OF COMMON STOCK BY DUNCAN, TRANSAMERICAN AND HORSEY

34. During the past six years, Duncan, Transamerican and Horsey have made numerous resales of their UMI common stock. The proceeds of these resales have inured to the benefit of Duncan and Horsey.

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

35. From on or about October 15, 1967 to on or about February 15, 1973 Duncan sold approximately 345,000 shares of UMI common stock to approximately 60 investors. During this same time period, Transamerican sold approximately 475,000 shares of UMI common stock to 36 investors. The proceeds from these sales amounted to approximately \$500,000.

36. From on or about September 15, 1967 to on or about February 15, 1973 Horsey sold approximately 190,000 shares of UMI common stock to approximately 74 investors for a total consideration of approximately \$100,000.

37. Many of the investors who purchased their shares of UMI common stock from Duncan, Transamerican and Horsey, knew very little about the operations of UMI, its financial condition or other facets of its business.

B. OPINIONS OF COUNSEL

38. As discussed previously at paragraphs 21 through 33 above, UMI issued its common stock to investors for various consideration including cash, services, property, in exchange for debentures, in exchange for interest on debentures and in exchange for Banner participations. All the common stock of UMI was issued in conjunction with opinions of counsel as to the legality of the transactions. These opinions, validating the

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

issuance of UMI common stock, were rendered by either Homans or Gedalecia or by Homans and Gedalecia together.

I. LEGAL OPINIONS VALIDATING ISSUANCE OF UMI COMMON STOCK ON CONVERSATION OF 6% AND 7% DEBENTURES.

39. As previously discussed, at paragraph 23 above, between May 16, 1968 and February 19, 1971, UMI issued 1,100,000 shares of its common stock to approximately 250 UMI debenture-holders on conversion of their 6% and 7% debentures. These 1,100,000 shares of UMI common stock were issued in reliance on approximately 82 separate legal opinions rendered by Homans during the period of May 1968 to May 1970.

40. Each and every one of the approximately 82 opinions rendered by Homans was based on a previous legal opinion rendered by Gedalecia in a letter of March 11, 1968. A copy of Gedalecia's opinion letter of March 11, 1968 is attached herewith as Exhibit A.

41. Gedalecia's opinion, which it is to be emphasized formed the basis of all 82 opinions issued by Homans, frankly concedes that the issuance of the UMI debentures--previously discussed at paragraphs 11 through 20 above--had originally been issued in violation of the federal securities law. Despite this frank concession of illegality concerning the issuance of the debentures, the Gedalecia opinion letter goes on to say--though

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

without offering justification in law or fact--that the conversion into common stock of the illegally issued debentures would not constitute a further illegal act.

42. This obviously inadequate opinion letter (obviously inadequate since it rested on a basis of conceded illegality) of March 11, 1968 is further demonstrated when some 20 months later, on November 3, 1969, Gedalecia himself, gave a new and different explanation to justify the issuance of the debentures.

43. The new explanation appeared as a response to a question in a report that UMI was required to file, and did file on November 3, 1969, with the Commission. The report--known as Form 10 and which contains basic financial information concerning an issuer--was prepared by Gedalecia in his capacity as company counsel.

44. In the report, Gedalecia apparently abandoned the view expressed in the March 11, 1968 opinion letter cited in paragraph 40 above, that the UMI debentures had been issued illegally. Instead, the Form 10 report now asserted that the debentures had been validly and properly issued by virtue of an exemption from the registration provisions of the federal securities laws.

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

45. The specific exemption claimed is that found in Section 4(2) of the Securities Act which provides that securities may be issued without registration if the issuance does not involve a public offering. Like the legal opinion of March 1968, which it was designed to replace, this new justification was also invalid.

46. This new explanation was invalid because, among other things, the UMI 6% and 7% convertible debentures were issued to approximately 450 persons--most of whom had little knowledge about the operations of UMI, its financial condition or other facets of its business, or access to the kind of information that the Securities Act would have required to be made available in the form of a registration statement.

47. In sum, Homans validated the issuance of UMI common stock in absolute reliance on a Gedalecia opinion which was plainly inadequate in that:

(a) it first conceded that the debentures in exchange for which the stock was being issued had been illegally issued; and then

(b) the concession of illegality was abandoned in reliance on an improper claim of exemption which Gedalecia and Homans knew or should have known was improper.

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

II. LEGAL OPINIONS VALIDATING ISSUANCE OF UMI COMMON STOCK
IN LIEU OF CASH AS INTEREST PAYMENTS ON DEBENTURES

48. As previously described at paragraph 21 above, upon issuance of its 6% and 7% debentures, UMI was confronted with an annual interest liability of approximately \$300,000. To meet this liability, UMI issued approximately 270,000 shares of its common stock to approximately 300 debentureholders in lieu of cash as interest payments on the debentures from on or about August 15, 1969 to on or about June 15, 1971. The common stock given in lieu of cash was issued in reliance on 36 separate legal opinions given by Homans between June 1969 and February 3, 1971.

49. Each and every one of the 36 separate opinions rendered by Homans was based on an opinion or opinions previously given by Gedalecia's law firm without any independent study or research concerning the fundamental facts involved.

50. Between June 1969 and February 3, 1971, Gedalecia's law firm rendered seven separate opinions regarding the legality of the issuance of UMI common stock in lieu of cash as interest payments on the outstanding 6% and 7% debentures.

51. In each of the 36 opinions issued by Homans, a copy of one of the seven Gedalecia opinions were attached. Of the

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

seven opinions, three, which were dated June 25, 1969, August 20, 1969 and February 3, 1971, were signed by Gedalecia. The other four opinions, which were dated July 14, 1969, August 22, 1969, September 12, 1969 and October 15, 1969, were signed by another member of Gedalecia's firm at the request of Gedalecia.

52. Six of the seven opinions rendered by Gedalecia's law firm relied on Section 3(a)(9) of the Securities Act as the exemption from registration applicable to the issuance of UMI common stock in lieu of cash as interest payments on debentures. The last opinion dated February 3, 1971, relied on Section 4(2) of the Securities Act as the exemption from registration.

53. Neither exemption was properly claimed. Section 3(a)(9) is not available as an exemption from registration in the instant case, since the issuance of UMI common stock in lieu of cash as interest payments on debentures did not involve a security exchanged by the issuer with its existing security holders; nor is Section 4(2) available as an exemption as previously discussed at paragraph 46 above.

III. LEGAL OPINIONS VALIDATING ISSUANCE AND SALES OF UMI COMMON STOCK BY UMI, DUNCAN, TRANSAMERICAN AND HORSEY

54. All the common stock (other than that issued on conversion or in lieu of cash as interest on debentures) that was issued by UMI in exchange for cash, services and property

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

and all the UMI common stock that were sold by Duncan, Transamerican and Horsey, were authorized through various legal opinions rendered by Homans.

55. In this connection, Homans rendered 46 separate opinions between January 1969 and December 1972 for the issuance by UMI of approximately 850,000 shares of common stock to approximately 100 investors. Further, he rendered 42 separate opinions regarding the legality of all the sales by Duncan, Transamerican and Horsey discussed at paragraphs 35 and 36 above. All such opinions alleged the transactions were exempt from registration by virtue of the Section 4(2) private offering exemption.

56. Homans never made any independent examination of the individual investors to determine whether they possessed the necessary sophistication and knowledge of the business of UMI to participate in a valid private offering as required before any claim can be made that such exemption may be available. Had such an independent examination been made it would have revealed that the Section 4(2) exemption was inapplicable to these sales of UMI common stock since the individuals purchasing the stock generally knew little about the operations of UMI, its financial condition or other facets of its business.

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

IV. LEGAL OPINIONS VALIDATING ISSUANCE OF UMI COMMON STOCK
IN EXCHANGE FOR BANNER FRACTIONAL INTERESTS

57. From on or about April 4, 1972 to on or about May 9, 1972 Gedalecia issued 12 separate opinions for the issuance of approximately 470,000 shares of UMI common stock to 48 persons. The shares of UMI, issued pursuant to the 12 opinions, constituted conversions of Banner participations for the common stock of UMI.

58. The 12 opinions rendered by Gedalecia on the conversion of Banner participations, previously discussed at paragraphs 28 through 32 above, alleged that the transactions to which they pertained were exempt from registration by virtue of Section 4(2) of the Securities Act.

59. Gedalecia never made any independent examination of the 48 investors to determine whether they possessed the necessary sophistication and knowledge of the business of UMI to participate in a valid private placement. In essence, he acted in a similar manner as Homans by rendering legal opinions without making any review of the circumstances surrounding the transactions. Had such an independent examination been made it would have revealed that the Section 4(2) exemption was inapplicable to the issuance of UMI common stock in exchange for Banner fractional interests since the individuals who exchanged their interests in Banner for shares of UMI common stock knew

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

little about the operations of UMI, its financial condition or other facets of its business.

60. Furthermore, had Gedalecia made even a cursory investigation of the circumstances surrounding the issuance of UMI common stock in exchange for Banner fractional interests, it is reasonably certain that he would have learned of the Banner offering and the tender provisions discussed at paragraph 29 above. Instead, he authorized an exchange of the Banner participations for unregistered UMI common stock despite UMI's previous described commitment to register any common stock tendered in exchange for Banner participations.

C. FRAUD IN CONNECTION WITH THE PURCHASE OR SALE OF UMI SECURITIES

61. In connection with the offer and sale of UMI common stock, the defendants UMI, Duncan, Horsey and McCartney made numerous false and misleading statements to investors concerning the stock price, earnings and operations of UMI.

I. MISLEADING STATEMENTS REGARDING THE PRICE OF UMI COMMON STOCK AND PER SHARE EARNINGS

62. Representations were made to investors by Duncan, Horsey and McCartney that the price of UMI common stock would rise. In some instances the prediction was for a rise to \$10 per share and in other instances to a rise of \$20 per share. It

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

should be noted that the price of UMI common stock has never traded above \$6 per share.

63. The representations regarding the future price rise of UMI common stock were made continually between 1968-1972.

64. In addition to predictions of a price rise in UMI common stock, Duncan, Horsey and McCartney also told potential investors that UMI projected earnings of \$1 per share. It should be noted that UMI has consistently operated at a loss and has at no time shown any earnings per share.

65. The representations regarding the projected earnings were continually made to potential investors by Duncan, Horsey and McCartney from 1969-1972.

II. MISLEADING NEWS RELEASES REGARDING THE EARNINGS AND OPERATIONS OF UMI

66. On May 17, 1971 UMI sent a news letter to its shareholders and certain broker-dealers, reporting net sales of \$342,000 and an operating profit of \$188,000 for the six months ended March 31, 1971. However, the UMI Annual Report for the year ended September 31, 1971 (which, of course, included the six month period ended March 31, 1971) reflected net sales of \$287,247 and a loss of \$195,131.

67. The inconsistency between the income statement

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

of March 31, 1971 and September 31, 1971, arose because, at the request of the independent auditors of UMI, the sales of Banner Oil participations had been omitted in the calculation of net sales for the year ended September 31, 1971.

68. UMI failed to issue a clarifying release explaining the inconsistency in the income statement of March 31, 1971 and September 31, 1971 when, in fact, UMI knew that sales of Banner Oil participations had been included in the six month unaudited figures of March 31, 1971, but at the request of the independent auditors of UMI, the sales of Banner Oil participations had been omitted in the calculation of net sales for the year ended September 31, 1971.

69. On April 30, 1972, UMI sent a news release to its shareholders and certain broker-dealers, announcing the favorable results of a core drilling program in Austria of certain leaseholds owned by UMI and disclosing plans for further core drilling in the summer of 1972. A copy of this news release is attached to this affidavit as Exhibit B.

70. The information contained in the release of April 30 1972 was misleading in that it omitted to state that UMI was financially incapable of carrying out its core drilling plans.

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

III. MISLEADING STATEMENTS REGARDING PROPERTY RIGHTS

71. In a news release dated December 11, 1972, UMI announced that on October 21, 1972 the stockholders of DAL Petroleum Company ("DAL") approved a resolution to merge DAL and UMI. A copy of the news release is attached to this affidavit as Exhibit C.

72. According to the release, DAL claims ownership of the oil and gas rights to a substantial block of acreage lying off-shore of Alaska in international waters beyond the "12 mile limit". These oil and gas claims supposedly extend to the North Pole and include over one billion acres of underwater property. The release describes the recordation of these claims with the Department of the Interior, various United States District Courts, the Court of International Justice at the Hague and several countries with coastlines along the Arctic Ocean. The validity of these claims, the release continues, is based on the opinion of expert counsel and DAL believes the claims are valid, but title remains untested.

73. The information contained in the release of December 11, 1972 was misleading in that it omitted to state that in a letter dated June 22, 1971 (attached to this affidavit as Exhibit D), the solicitor of the Department of Interior,

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Mitchell Melich, wrote to A. A. Hopkins, president of DAL, sharply disputing DAL's contention of ownership of certain offshore oil and gas claims and advising DAL that their statements concerning claims being "recorded" with the Bureau of Land Management of the United States Department of the Interior were both inaccurate and misleading as neither the Bureau of Land Management nor any other office of Bureau of the Department of the Interior is authorized by law or regulation to "record claims" of this sort.

74. The management of UMI was aware of the June 22, 1971 letter by the Department of Interior, yet it nevertheless issued the news release dated December 11, 1972.

SUMMARY -- NEED FOR RELIEF

75. From on or about September 15, 1967 to the present time defendants are known to have distributed approximately four million unregistered shares of common stock of UMI and from on or about November 1966 to December 1968, defendants are known to have distributed unregistered UMI 6% and 7% convertible debentures with a face amount of approximately four million dollars, in exchange for valuable consideration.

76. In promoting the distribution of unregistered UMI securities, defendants disseminated false and misleading

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

information concerning UMI to the investing public.

77. Defendants UMI, Duncan and Horsey still retain control of the corporate mechanism whereby new shares are issued and are also believed to retain a substantial number of shares already issued and outstanding.

78. In all of the above activities with respect to the distribution and sales of the unregistered securities of UMI and the dissemination and communication of false and misleading information concerning UMI, the defendants made use of the mails of the means and instrumentalities of transportation and communication in interstate commerce. Among other things, defendants utilized the United States mails to transport UMI stock certificates, and checks after sale.

79. No previous application for the relief sought herein has been made to this or any other Court.

80. Wherefore, it is respectfully requested that this Court issue an order preliminarily enjoining the defendants from further violations of the registration and anti-fraud provisions of the federal securities laws.

s/ John R. Filmore

Sworn to before me this
17th day of August, 1973

Barry J. Mandel

Notary Public

State of New York No. 41-7689940

Qualified in Queens County-Certificate filed in Queens County
Commission Expires March 30, 1974

EXHIBIT "A" TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Law Offices of
Aberson, Chikofsky & Gedalecia

William B. Aberson
Murray J. Chikofsky
Edward J. Gedalecia

342 Madison Avenue
New York, N. Y. 10017
(Area Code 212)
986 8065

March 11, 1968

Universal Major Industries Corp.
342 Madison Avenue
New York, N. Y. 10017

Gentlemen:

This refers to your question respecting the conversion into stock of outstanding debentures of Universal in accordance with the provisions contained therein.

In view of the fact that the debentures and the underlying stock into which they are convertible were in our opinion, sold in transactions violative of Section 5 of the Securities Act of 1933, as amended (as well as the Trust Indenture Act) the conversions at this time, as proposed, would not constitute additional violations of the Act.

Very truly yours,

ABERSON, CHIKOFSKY & GEDALECIA

s/ Edward J. Gedalecia

EXHIBIT "B" TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

FOR: UNIVERSAL MAJOR INDUSTRIES CORP.

APPROVED BY: James G. Duncan, President

SUBJECT: Arztal Iron Ore Beds Near
Matrei, Tyrol, Austria

N E W S

CONTACT: Jim Duncan 914-331-9433
 212-690-2000

RELEASE: IMMEDIATE April 30, 1972

UNIVERSAL MAJOR INDUSTRIES CORP.
REPORTS ON IRON ORE BEDS IN AUSTRIA

During the summer and fall of 1971, Universal Major Industries Corp. under the supervision of Dr. Oskar Schmidegg, formerly Chief Geologist of the Austrian Bureau of Mines, and Mining Engineer Julius Burger of Munich, Germany, carried out a core drilling program along a 3300' East-West front on the Company's properties in the Arztal near Matrei, Tyrol, Austria. Results of this have not been tabulated and are now presented for your information.

Quoting directly from Dr. Schmidegg's report:

"The iron ore beds in the Arztal extends from Ellbogen, East into Moelstal (a distance of about ten miles) and occurs in conjunction with layers of limestone which are embedded in quartz phyllite. By a process of metasomatism, the limestone layers have been replaced with the mineralization present throughout the entire limestone area. The ores present are ankerite, siderite, hematite, and iron pyrite. Assessments to date judge the deposit favorably."

Summary of results:

"The mineralized limestone layers were found everywhere with the exception of core hole No. 1 along a distance of 3300 feet in an East-West direction. Its thickness in the core holes correlates well with the thickness of the outcrops."

"The ore mineralization consists mainly of "ankerite" a large part of which is changed into oxidized iron ore (manganese dioxide).

EXHIBIT "B" TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Regionally iron ore mineralization is encountered in two areas; one in the West near Veiten, and in the East centered on core hole No. 3 with mineralization approximately 17 ft. thick."

Originally we reported from engineering appraisals (assays and core drilling) regarding 40% to 60% grade manganese bearing hematite siderite ore with estimated reserves visible from surface indications and core drillings from 400,000,000 tons to 600,000,000 tons.

Even though a limited amount of core drilling has been accomplished, the correlation of core data with visible outcrops along this 3300' East-West front CONFIRMS the thickness (17') of the deposit and its continuous length.

These encouraging results has led to our scheduling a program of core drilling this summer to block out additional tonnages.

Based on engineering data supplied to management even in this early stage leads us to believe that the Company has substantiated an asset sufficiently at this time to project an increase in the book value per share of Universal Major Industries Corp., which potentially has great value.

This size of the increase in book value per share will depend of course in the success of the Company in blocking out the additional tonnages and our negotiations for development by European interests for marketing the ore.

As reported previously, it will be necessary to install a pelletizing plant capable of up to one million tons annually. There is a greater market demand and consequently a higher price paid for iron pellets because of increased furnace efficiency. It also provides for the recovery of other precious metals such as copper which appears in streaks throughout the trend. These pellets would be sold in common market countries for use in local steel mills and electric furnaces.

Universal will continue in its obligation to carry out feasibility studies of the total project that will establish mining methods, metallurgical quality and provide data for the total design of mines and surface facilities.

Universal trades "over the counter" (OTC), and maintains offices at C. P. O. Box 668, Kingston, New York.

EXHIBIT "C" TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

FOR: UNIVERSAL INDUSTRIES CORP.

APPROVED BY: James G. Duncan, President

SUBJECT: Merger of Dal Petroleum into Universal

N E W S

CONTACT: James Duncan 914-331-9433
Roy Horsey 312-384-0120

RELEASE: IMMEDIATE December 11, 1972

DAL PETROLEUM AGREES TO MERGE WITH
UNIVERSAL MAJOR INDUSTRIES CORP. OF NEW YORK

At a special meeting of shareholders of Dal Petroleum Co. on October 23, 1972, a resolution was approved to merge all of the shares of DAL outstanding into Universal Major Industries Corp., on the basis of 2.5 shares of DAL for 1 share of Universal.

According to Dal Petroleum, DAL has numerous deep zone gas well properties in the Sacramento Valley area of California, where there are numerous offset adjoining locations which could be drilled that would substantially increase the earnings of the Company. These areas are the Llano Seco Gas Field in Butte County; the Fraser Lease in Ventura County, interest in a 16,000 acre lease in Larson County; interest in the Dunnigan Hills Gas Field, Yolo County, and overrides on the Tisdale Gas Field and Grimes Gas Field, Sutter County, near Sacramento.

DAL further reports that it has recently acquired the Dusky Diamond coal mining properties in Wyoming. A geological report issued by W. W. Stewart, Exploration Geologist and E. K. Schieck, both of Cooper, Wyoming, shows there are approximately 12 million tons of high-grade subbituminous 'B' and 'A' rank coal in the Dusky Diamond mines area.

DAL also has the rights to a substantial block of acreage covering oil and gas mineral claims lying offshore Prudhoe Bay Oil Field, Alaska, beyond the 12 mile limit in international waters. These claims also extend offshore the Aleutian Islands, Bering Straits, Canada, Greenland and extending to the North Pole with acreage totaling over one billion acres. These claims are based upon the placing of marker bouys to identify the area of the claim and were recorded with the Bureau of Land Management of the United States Department of the Interior, various

EXHIBIT "C" TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

clerks of the United States District Courts, the Court of International Justice at the Hague, and some of the countries with coastlines along the Arctic Ocean. The validity of the claims is also based on an opinion of expert counsel retained for this purpose. DAL maintains, based on such opinion, that these claims are valid, but title remains untested.

These claims also cover an area at the mouth of the Yukon River where an untested geologic structure lies onshore in a favorable geologic setting and which coastal areas are substantially open water year around. A successful development here could result in oil being shipped prior to completion of the Alaska Pipeline.

The Directors of Universal Major Industries Corp. have approved in principle such a merger, and passed a Corporate Resolution recommending such a merger, to be presented to a special meeting of shareholders, to be held subject to clearance of the proxy material by the SEC.

Universal Major Industries Corp., is an independent oil and gas producer in the Appalachians where the price for natural gas has skyrocketed at the well head from 25¢/MCF to 50¢/MCF. Universal has embarked on a core drilling program on a substantial iron ore property in Austria with additional core drilling scheduled to block out additional tonnage.

It is expected that following this merger substantial lines of credit may become available for development of the natural gas fields in the Appalachian areas and in California where ready markets and top prices for gas is now being paid and the Company holds some 200 proven offset drilling locations.

It should also be noted that any favorable development whatsoever on the Alaska Pipeline construction should have a positive effect on the future development of such merged companies, since acreage claims and holdings offshore at Prudhoe Bay, Alaska are substantial.

UNIVERSAL MAJOR INDUSTRIES CORP. trades "over the counter" (OTC) and maintains offices in New York City and Box 668, Kingston, New York, 12401.

EXHIBIT "D" TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20210

In Reply Refer To:

June 22, 1971

Mr. A.A. Hopkins, President
Dal Petroleum Company
9437 Santa Monica Boulevard
Beverly Hills, California, 90210

Dear Mr. Hopkins:

We have received a copy of your press release of May 18, 1971, announcing acquisition by Dal Petroleum Company of a 34,000,000 acre oil and gas claim from prior claimants Jack L. Vance and Carland A. Smith, Dallas, Texas, and described as covering areas of international waters off the northern Coast of Alaska. A second claim area is described as beginning off the northern Alaskan Coast, extending across the North Pole to offshore Greenland, then west offshore northern Canada to northern Alaska, including the Bering Sea and Aleutian Island chain areas.

The press release further states that the claims are based upon the placing of marker buoys to identify the area of the claim and "were recorded" with the Bureau of Land Management of the United States Department of the Interior and certain courts and countries. You are also quoted as stating that the company hopes to have a \$6,000,000 drilling fund available by this June, and that once the funding terms have been consummated, "development is scheduled to commence shortly thereafter". The proposed drilling location is said to be located "approximately 12 miles from the Prudhoe Bay Oil Field" and that "to the knowledge of the Company, will be the first oil exploration in the international waters of the Arctic Ocean.

To the extent that any of the "claims" referred to in your press release purport to cover any areas of the Outer Continental Shelf of the United States, this is to advise you that the Federal Government has exclusive jurisdiction, control and power of disposition over the natural resources of such areas, including the oil, gas and other mineral deposits. Presidential Proclamation No. 2837 of September 28, 1945 (59 Stat. 885); Outer Continental Shelf Lands Act, of 1953, 43 U.S.C. Sec. 1331-1343; United States v.

Regional Solicitor, Anchorage

Received
Regional Solicitor
Department of Interior
June 2, 1971
Anchorage, Alaska

EXHIBIT "D" TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Louis M. Ray, et al., C.A. 5, 1970, 433 F.2d 16; Geneva Convention on the Continental Shelf (1958), 15 U.S.T. 473; United States v. California, 332 U.S. 19 (1947); United States v. Louisiana, 339 U.S. 699 (1950); North Sea Continental Shelf Cases, 1969 I.C.J. Reports, 3. Consequently, any attempt by your company, or others, to conduct drilling or other mineral development operations on areas of the Outer Continental Shelf of the United States offshore Alaska or elsewhere along its coasts, without having first obtained lease authorization from the Secretary of the Interior, as required under the OCS Act, would be patently illegal. In such event, the Federal Government would, as it has in the past, institute such injunctive or other actions in the courts as would be necessary and appropriate in the circumstances. United States v. Louis M. Ray, et al. supra; United States v. Oceanographic Mining Systems, Inc., Civil No. 70-1680, U.S.D.C., S.D. Fla (1970). See also Santa Monica Bank, et al. v. United States, et al., Civil No. 69-1905-RM, U.S.D.C., C.D. Cal. (1971); Ratner v. Union Oil Company, et al. (United States, amicus curiae), Civil No. 69-15398, U.S.D.C., C.D. Cal. 1969, No. 25429, C.A. 9; Securities and Exchange Commission v. Ford L. MacElvain and Robert E. MacElvain, individually and d/b/a Deep Rock Drilling Company, U.S.D.C. Ala. (1968), 299 F. Supp. 1352, affd. C.A. 5 (1969), 417 F. 2d 1134.

We also wish to advise you that, in our opinion, the statement of your press release that these claims were "recorded" with the Bureau of Land Management of the United States Department of the Interior is both inaccurate and misleading. Mr. Jack L. Vance mailed some so-called claim documents to the Colorado Land Office and these were later forwarded to the Alaska State Office, Bureau of Land Management. However, the mailing of these documents to the Bureau's offices in no way constituted a recordation. Neither the Bureau of Land Management nor any other office or Bureau of the Department of the Interior is authorized by law or regulation to "record" claims of this sort.

Sincerely yours,

/s/ Mitchell Melich

Solicitor

OFFER OF PROOF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

SAME TITLE

73 CIV. 3626
C.H.T.

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Defendant Arthur J. Homans, by his attorney, Bradley R. Brewer, respectfully submits to the court the following offer of written proof. We submit that, if Mr. Homans were to give oral testimony on the following subjects, he would testify as set forth below. If consent is given by counsel for the plaintiff to the offer by Mr. Homans of proof in this form, such consent should be understood as involving no admission by the SEC of the truth of any facts herein stated and no waiver of any right by the SEC to controvert any such facts, whether by presentation of evidence or by written or oral argument.

(1) Schedule of Transfers, Issues and Related Information. The schedule of transfers and issuances of shares of stock of Universal Major Industries Corp. ("UMI") ("Transfer Schedule") herewith offered in evidence was prepared by Mr. Homans from the records of his office of the transactions described therein. That schedule presents a true and accurate statement of the facts and circumstances set forth therein based upon the personal knowledge of Mr. Homans and the contents

OFFER OF PROOF

of records kept and maintained by him as an attorney for UMI.

(2) Schedule of Significant Events, Transactions or Meetings. The chronological schedule of significant events, transactions and meetings ("Event Schedule") herewith offered in evidence was similarly prepared by Mr. Homans from his personal recollections and office records and presents a true and accurate statement of the facts therein set forth as thus known or recalled by Mr. Homans or reflected in office records maintained by him as an attorney for UMI.

(3) Opinion letter from Arthur Homans to UMI dated 5/26/67 re proposed sale by private placement of \$3 million face amount of 6% convertible debentures. The opinion letter dated 5/26/67 herewith offered in evidence was given by Mr. Homans to Nils E.C. Sundling, President of UMI, on or about the date thereof.

(4) Memorandum from James G. Duncan to all members of the UMI board of directors issued on or about 11/17/67. The memorandum to members of the UMI board of directors from James G. Duncan (then UMI's largest individual stockholder) herewith offered in evidence was sent by Duncan to those members on or about 11/17/67, and a copy thereof was sent by him to Mr. Homans.

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(5) Tabulation of transfers and issuances (collectively "transfers") based upon AH Transfer Schedule. The following facts are shown in the Transfer Schedule:

(a) Total transfers between 3/22/67 and 10/25/67 (when Edward Gedalecia ("EG") was retained.....	33
(b) Total transfers between 3/22/67 and 5/16/68 (when James Duncan ("JGD") became President)	47
(c) Total transfers between 3/22/67 and 12/31/67.....	37
(d) Total transfers during calendar 1968.....	39
(e) Total transfers during calendar 1969.....	48
(f) Total transfers during calendar 1970.....	69
(g) Total transfers during calendar 1971.....	49
(h) Total transfers during calendar 1972.....	12

(6) All transfers made prior to retention of EG on 10/26/67 and the election of JGD as President on 5/16/68 were to bona fide "insiders", i.e., to officers and directors of

OFFER OF PROOF

UMI, members of their families and close personal friends --- most of whom were members of the "Horsey Group" of investors. Prior to Duncan's election as President of UMI on 5/16/68, all transfers were unquestionably proper "private placements" to corporate officers, directors and their close privies. As of that date --- by which time Homans had long since ceased to be asked for, to give, or to be paid for any advice with respect to the federal securities laws and the corporate offices and records of UMI had been physically transferred to Gedalecia's offices, where Gedalecia and Duncan conferred on a daily basis without consulting Homans --- UMI had made no transfers which created any significant problem with respect to the so-called "private placement" exemption from the federal registration requirements.

(7) During the period between 3/22/67 (when Ashbach sold his interest in UMI to the "Horsey Group") and 5/16/68 (when Duncan replaced Horsey as President of UMI) and, particularly, prior to 10/26/67 (when Gedalecia was retained as sole securities law counsel for UMI and its offices and corporate records were moved to Gedalecia's office), (a) Horsey was in charge of UMI's corporate affairs and securities transactions; (b) Horsey consulted with Homans on federal securities

OFFER OF PROOF

laws matters and basically followed Homans' advice; (c) there was established between Horsey and Homans a working "understanding" and practice or course of conduct with respect to the proper limitations to be placed upon the issuance and transfer of UMI shares on an occasional, "private placement" basis to a limited number of persons closely and intimately related to members of management; (d) pursuant to that understanding and practice, as it developed over a period of time, a limited number of transfers were made the details of which were known to Homans and in most of which the "investment decision" was made, as a practical matter, by Horsey himself in whom the members of the "Horsey Group" of investors placed implicit, complete and unrestricted faith; (e) all transfers listed on the AH Transfer Schedule as having been made prior to Duncan's election as President (on 5/16/68) were made pursuant to and consistent with the working understanding between Horsey and Homans with respect to "private" transfers; and (f) the nature of that working understanding between Horsey and Homans is reflected in Homans' opinion to UMI dated 5/26/67, which was during Sundling's brief tenure as President.

(8) After UMI retained Gedalecia as its exclusive securities law counsel on 10/26/67, Homans' consultations with Horsey on securities law matters ceased for all practical

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purposes, but it was Homans' understanding and belief that transfers forwarded to him by UMI management after that date (with executed "investment letters" and representations by management that the transaction was "private") were based upon the understanding practice and limitations which had previously been established between Homans and UMI management. It was on the basis of that understanding and belief on the part of Homans, reinforced by past experience and by the retention of experienced securities law counsel with impressive credentials as a former SEC staff attorney specializing in the securities of companies in the oil and gas business, that he continued to issue, as a "courtesy" to UMI and completely without compensation, the "private-placement" exemption opinions listed on the Transfer Schedule as having been issued after the retention of Gedalecia.

(9) On 10/26/67, Gedalecia was retained as exclusive securities law counsel for UMI. At that time and thereafter, Homans reasonably believed that the advice given by him in his letter of 5/26/67 and similar advice given informally by Homans to UMI management was being followed by it and being reinforced by subsequent advice given by Gedalecia to management to which Homans was not privy and of which he was not kept apprised. At no time prior to 1/15/73 (when Homans ceased completely to serve as counsel in any capacity for UMI), did Homans become aware

OFFER OF PROOF

of any facts which caused him to doubt that the "ground rules" for the submission by UMI management to him of "private placement" transfers which had originally been established between Homans and Horsey were no longer being followed by Duncan and Gedalecia in making such submissions to him for forwarding to the UMI transfer agent. Investigative efforts undertaken by Homans after this action was commenced have led him to conclude that, quite unknown and unsuspected by Homans, Duncan (who ran UMI out of Gedalecia's offices after he became President and therefore consulted with Gedalecia on an almost daily basis) had, at some point late in December of 1968 or early in 1969, abandoned the limitations upon "private placement" transfers previously imposed by the working arrangement between Homans and UMI management and done so without informing Homans that any change had taken place in the company's practice in that connection. All transfers submitted to Homans after that time were submitted to Homans by UMI in exactly the same way as they had been submitted before. Homans had absolutely no reason to believe that "the signals had been changed" by UMI management. Indeed, the retention of Gedalecia as securities counsel on 10/26/67, the physical transfer of the UMI offices and corporate records to Gedalecia's office, and the regular consultation

OFFER OF PROOF

which Homans knew to be taking place between Duncan and Gedalecia, all served to reinforce Homans' belief that UMI was being soundly advised in connection with "private placement" transfers (which, if done unwisely, would jeopardize the registration which Gedalecia had been hired to file), that the limits previously imposed upon such transfers were still being imposed by Duncan and others in UMI's management, and that Gedalecia was aware of the transfers being sent to Homans by Duncan and had personally approved of them. Since Homans was not paid to investigate these "post Gedalecia" transfers or for his opinions with respect to them and Gedalecia was so retained and so paid (as UMI's only securities law counsel) and UMI had made perfectly clear to Homans when it hired Gedalecia that it did not want any further advice from Homans on federal securities law matters and would not pay him for any services in that connection, that state of mind on the part of Homans was both understandable and reasonable in the circumstances.

Respectfully submitted,

BREWER & SOEIRO
Attorneys for Defendant
Arthur J. Homans

Dated: New York, N. Y.
February 15, 1974

by s/ Bradley R. Brewer
Bradley R. Brewer

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

226

3 -----x

4 SECURITIES AND EXCHANGE :
COMMISSION,

5 Plaintiff, :

6 -against- : 73 Civ 3626

7 ARTHUR J. HOMANS, :

8 Defendant. :

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February 15, 1974
2:30 p.m.

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BEFORE: Hon. CHARLES H. TENNEY,

District Judge

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APPEARANCES:

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JEFFREY TUCKER, ESQ.
STUART PERLMUTTER, ESQ.
Attorneys, Securities and
Exchange Commission

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BRADLEY R. BREWER, ESQ.
Attorney for defendant

2 A R T H U R J. H O M A N S , resumed

3 the stand and testified further as follows:

4 DIRECT EXAMINATION (Cont'd)

5 BY MR. BREWER:

6 Q Mr. Homans, do you have--yes, you do--a copy
7 of what I believe is Defendant's Exhibit G, which is the
8 schedule of significant events?

9 A Yes. I have a copy before me.

10 Q I would just like you to refer to that briefly
11 and to indicate for the Court the significance of two
12 events indicated there. First, the retention of Mr.
13 Gedalecia by UPI as security counsel on October 26, 1967.14 A On page 2? Well, the page 2, the last item,
15 and page 3. Yes, sir.16 Q I believe that you described in some respects
17 the circumstances involved in Mr. Gedalecia's retention,
18 that is if I recall the testimony correctly, that you were
19 called the day before a corporate board meeting and advised
20 that a securities counsel would be retained other than your-
21 self and then the next day at a meeting, at the adjourned
22 session of a board meeting Mr. Gedalecia was retained, if
23 I understand correctly.24 A I believe that I did previously testify that
25 I learned about it at the meeting, but in reviewing my

1 rgv 3

Homans-direct

2 records I see that I received a telephone call--a
3 conference telephone call with Mr. Horsey in Chicago and
4 Mr. Duncan in New York on October 16th in which they then
5 advised me that they were going to designate new counsel--
6 I did not learn the name of that new counsel--for the prep-
7 aration of the SEC registration statement. They told me
8 then that I was to be continued as corporate counsel on the
9 retainer basis and that I was to be paid a separate per
10 diem fee in the event I was called on to perform any
11 services in relation to the registration statement. Then
12 the actual meeting was held on the 26th of October. The
13 morning portion of the meeting was an extensive session with
14 just the directors present and then in the afternoon por-
15 tion of the meeting they called me in, they called Mr.
16 Gedalecia in--that's when I met him for the first time--
17 and they had an accounting firm representative to discuss
18 the accounting portion of the S1, of the registration
19 statement.

20 Q If I remember correctly, I believe we put in
21 evidence the minutes of the meeting, the minutes of October
22 26, 1967?

23 A Yes. I have a copy of the minutes, that's
24 right.

25 THE COURT: Did you receive any per diem

1 rgv 4

Homans-direct

323

2 payments?

3 THE WITNESS: No, sir, I did not, outside of
4 my retainer.

5 May I modify the Judge's question? When he asked
6 per diem payments--

7 Q I don't know if you can do that, but you can
8 say what's relevant.

9 A I received no per diem payments in any way
10 relative to the SEC registration statement. However, out-
11 side of my retainer I billed separately for litigation,
12 which was paid.

13 Q But that was part of the--

14 THE COURT: That was part of the retainer
15 agreement?

16 THE WITNESS: Yes.

17 Q In an attempt to shorten things a bit, is it
18 a fact, that soon after Mr. Gedalecia's retention by the
19 corporation, he took possession of its corporate books and
20 records?

21 A Well, I know that the minute books which I had
22 in my possession--there were about four--were turned over
23 to him, but when you talk of other books and records, the
24 corporation joined his suite, made their offices in his
25 suite so that whatever books and records of UMI were

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2 available in existence were available to him.

3 Q Well, that was going to be my second question.
4 The first part of the question perhaps should have been is
5 it a fact that the corporate books and records which had
6 previously been in your possession transferred to Mr.
7 Gedalecia's possession after that?

8 A That's correct.

9 Q That's the case?

10 A Yes. That was limited to the minute books.

11 Q And the second part of what I was going to
12 get at was that also immediately after his retention the
13 corporation's corporate offices were also transferred
14 to Mr. Gedalecia's offices and were physically in the
15 same place herein New York City; is that correct?

16 A That is correct, at 342 Madison Avenue.

17 Q Who was the president at that time?

18 A Well, at that time I believe Mr. Sundling
19 had terminated. I think Mr. Horsey was the president.

20 Q You can consult your chart there, I believe.

21 A Yes, I see Mr. Horsey was both president
22 and chairman.

23 Q Did he have his office in Mr. Gealecia's
24 offices, was it part of Mr. Gedalecia's offices?

25 A No. Mr. Horsey had his personal office in

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2 Chicago, but the corporate office--

3 Q Was in New York.

4 A Of UMI was in New York.

5 MR. PERLMUTTER: Your Honor, excuse me for inter-
6 rupting, but can we have an offer of proof of the rele-
7 vancy of this line of questioning?

8 THE COURT: I think he is trying to show that
9 as of a certain date he ceased to be the counsel for the
10 company.

11 MR. PERLMUTTER: I think we have been going
12 over things that we already covered on prior testimony.

13 MR. BREWER: I don't recall any prior testi-
14 *relevant*
15 mony subsequent to the movement of the company's offices.
16 If you can show it to me in the record I would be happy
17 to consider it. I read it very carefully myself and it
18 is not in there.

19 MR. PERLMUTTER: Not that particular point,
20 Mr. Brewer, but the fact there was a change and the fact
21 that Mr. Gedalecia--

22 MR. BREWER: The first question was simply
23 a preamble to the second, which was important, which was
24 the corporate office in New York became coterminous with
25 those of Mr. Gedalecia and what business it did in its
New York office was done right there in the place where

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2 Mr. Gedalecia was.

3 Q Is that an accurate statement, Mr. Homans?

4 A Yes.

5 Q How soon after that did Mr. Duncan become
6 president of the company?

7 A Mr. Duncan became president of the company on
8 May 16, 1968. However, in the interim, after his resig-
9 nation, because of the conflict of interest in as much as
10 he was involved in a personal transaction with the company,
11 and his election as a director--as the president, he con-
12 tinued as a consultant to the company and really, in a
13 sense, continued in active management. It was previously
14 the--the office was previously in his suite at the Croyden
15 Hotel.

16 Q Mr. Duncan's?

17 A Mr. Duncan's suite at the Croyden Hotel and
18 it was moved from Mr. Duncan's suite to Mr. Gedalecia's
19 suite.

20 Q Now, after the time when Mr. Duncan became
21 president of the corporation in May of 1968, do you have
22 any knowledge concerning how frequently he was at Mr.
23 Gedalecia's offices and how frequently they conferred about
24 the corporate matters of the corporation and its legal
25 problems?

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2 A I have no personal knowledge. I have numerous
3 assumptions.

4 Q Were you ever there when they consulted or
5 did Mr. Duncan ever mention to you how often he had been
6 in the corporate offices?

7 A Yes. Mr. Duncan mentioned to me that he was in
8 frequent consultation with Mr. Gedalecia, particularly
9 in the preparation of the Form 10; that he was likewise
10 in frequent consultation with Mr. Chicofsky, his partner,
11 and with a member of their staff, Ed Blummer, who was
12 actually doing the pencil pushing on the preparation of
13 the Form 10.

14 Q Now, after that time, what was the frequency
15 of Mr. Duncan's consultation with you?

16 A Comparatively infrequent. He would see me
17 from time to time. I was handling other matters. At
18 that time there was substantial litigation against the
19 company, like Steve Wiles' case and one or two other
20 cases that I was **defending**, which involved preparation and
21 it involved consultation.

22 Q Did he consult with you about security law
23 matters after Mr. Gedalecia was retained?

24 A No. No. Once in a while he said to me that
25 Mr. Gedalecia would look to me for some basic information

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2 which he would require and that I should cooperate with
3 him, which I agreed to do.

4 Q Was it your understanding that after Mr.
5 Gedalecia was retained, he was the securities law counsel
6 for the company and you were its general corporate law
7 counsel?

8 A Quite definitely.

9 Q And it was Mr. Gedalecia who was paid by the
10 corporation as a securities law expert and for advice or
11 securities law matters; isn't that correct?

12 A And for the physical preparation of the Form
13 10 and subsequently the S-1 registration statement, that
14 is correct.

15 Q Now, I believe that you testified during the
16 previous last days' hearing prior to today concerning how
17 you came to be counsel for UMI and that had to do--just to
18 recapitulate it briefly--with your having originally been
19 n
counsel for Mr. Ashback who owned the company--

20 A Who controlled the company.

21 Q Who was the controlling stockholder and managing
22 head of the corporation, to put it more technically, and
23 that there came a time when Mr. Duncan ~~was brought into the~~
24 picture and that Duncan brought with him his own attorney,
25 Mr. Johnson, I believe.

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2 A Correct.

3 Q And that after Mr. Duncan came into the pic-
4 ture, there came a time when the Horsey group came in and
5 became, for a period of time, the controlling stockholder
6 group and the management of the corporation and Mr. Horsey
7 became president of the company.

8 A Well, so far as I know they still are, or at
9 least when I terminated my services for them on January 15,
10 1973 they were still the controlling group.

11 Q Now, if I recall your prior testimony correctly
12 Mr. Duncan had an attorney named Mr. Johnson who was his
13 corporate and general attorney in connection with his
14 involvement in UMI in connection with those parts of UNI's
15 operation which Duncan brought in with him, is that correct?

16 A That is correct.

17 Q And you were originally the counsel for
18 ^hAshback and became sort of the counsel for the Horsey part
19 of it?

20 A At their invitation, yes.

21 Q At their invitation, if I understand correctly.

22 Now, how would you describe your relationship
23 as attorney to client with Mr. Horsey as the management of
24 UMI, not personally.

25 A I met Mr. Horsey for the first time on the day

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of that directors meeting, which was March 22, 1967, at
3 which--March 21, 1967, at which the consummation of the
4 ^h Ashback transaction resulted in Mr. Ashback's ^h resignation
5 as a director and as an officer and the election of Mr.
6 Horsey and his group as directors controlling the board
7 and then the following day another meeting with the Horsey
8 group.

9

That was the extent of my meeting with them.

10

They were both all day meetings. I learned somewhat at
11 that time of Mr. Horsey's--shall I say past experience and
12 reputation and I was in frequent communication subsequently
13 with Mr. Horsey by telephone in Chicago. There were a
14 number of directors meetings which were held in Chicago
15 afterwards between then I think and August--and October
16 at which I was not present, but Mr. Johnson had been pre-
17 sent and one or two directors meetings at which there were
18 no counsel present, but my relationship with Mr. Horsey
19 was that I had a very high regard for him for his experience,
20 for his background, for his **personality as an individual and** I
21 placed reliance on things that Mr. Horsey would say to me.

22

Q Was he a sophisticated person in the management
23 of corporations with publicly held stock?

24

A I would definitely say so. I was told at the
25 time that he was a retired executive. I think Mr. Horsey

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2 is now about 78 years old. I was advised that he was a
3 retired executive of DuPont; that he was also a retired
4 president of the Orange Crush Company, a soft drink vendor,
5 and that he was prominent, and his occupation and profession
6 at that time was in pension plans, formulating pension
7 plans, insurance plans for large corporations. I was also
8 advised at the time, and I learned subsequently, through
9 other clients, that Mr. Horsey had been an investor in many
10 other successful corporations, usually as a restricted
11 stockholder and a private placee.

12 In other words, he went into speculative situa-
13 tions which turned out to be successful.

14 Q In the course of the relationship you have
15 described, did you have occasion to discuss with him the
16 nature and composition of the people that you have referred
17 to--some of whom you have identified as the Horsey group?

18 Did you come to be familiar with who those
19 people were and what the relationships among them were?

20 A Some of the people, yes.

21 Q Did you come to know who the Intervarsity
22 whatever it is?
was?

23 A Well, I didn't come to know the seven people,
24 but I came to know his association with Intervarsity
25 Christian Fellowship, yes, and I also knew of his association

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2 with the Emmaus Bible School.

3 Q Did you have occasion to discuss with Mr.
4 Horsey, or to become--to discuss with Mr. Horsey the cor-
5 porate and securities laws affairs of the company and the
6 circumstances under which stock could privately--stock could
7 be sold on a private placement restricted basis?

8 A Well, it wasn't a question so much of sale of
9 stock on a private placement basis. Mr. Horsey had from
10 time to time asked me about the possibility of transferring
11 some of his shares to other people, and I told him that
12 it could be done in a limited number of transactions. It
13 could be done only to persons who were familiar with the
14 company and who had access to the financial information, to
15 which he said, "Oh, I can always give them that and any-
16 body who wants that can always get it from me."

17 Basically those were the things that I dis-
18 cussed with him at the time.

19 Q Now, I show you a copy of Plaintiff's Exhibit
20 H, I believe, which is a letter of May 26, 1967--

21 MR. TUCKER: Defendant's Exhibit.

22 MR. BREWER: Right, Defendant's Exhibit. The
23 letter indicates it must be so it is ^{must} a Defendant's Exhibit.

24 Q Which is an opinion letter from you to the
25 company addressed to Mr. Sundling which, according to the ^{who}

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2 chart you have just been referring to was the president
3 of the company during the certain period of time which
4 includes that date.

5 A Right. I had forgotten about this in our
6 last hearing until I searched my files and found the--
7 .found my office copy.

8 Q Let me stop you there for a moment and let me
9 ask you this question:

10 Does the substance of that letter accurately
11 reflect the kind of securities law advises^{ce} in connection
12 with private placements which you were describing as having
13 given to Mr. Horsey orally?

14 A Yes.

15 Q Well, it's in evidence, but of course it's
16 true, is it not, that you in fact delivered the original
17 of this--or mailed the original of this letter to the
18 company--

19 A Oh, yes.

20 Q As this copy would indicate?

21 A Oh, yes. No, the copy does not indicate who
22 else in the company received copies, but--

23 Q Do you have any idea of who else might have
24 received copies of it, or did?

25 A I don't know. I might have--

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2 Q It's not an important point. If you happen to
3 know it, that's fine.

4 A I might have sent a copy at that time to
5 Tom Johnson, but I have no specific recollection of that.
6 I know that numerous correspondence were sent to Tom
7 Johnson **who was my co counsel.**

8 Q Now, I show you a copy of a document which is
9 defendant's next lettered exhibit following the letter,
10 which purports to be a memorandum from James G. Duncan
11 to the members of the board of directors on the subject
12 of securities law and I ask you if you received that and
13 if the advice ^{ce} that is reflected in it is consistent with
14 the kind of advice that you were giving the company at
15 that time.

16 A Yes, to all questions. I received this from
17 Mr. Duncan and the date of its receipt is handwritten in
18 my handwriting.

19 Q Do I understand correctly that you put that
20 on it when you received it?

21 A Yes. November 17, 1967. And it is consistent
22 with the advice which I had given to Mr. Sundling, Mr.
23 Horsey and even the members of the board when they asked
24 me.

25 Q Now, I direct your attention to the second page

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2 of that document which states , in substance, that the company
3 had been receiving requests from people suggesting that
4 they be allowed to receive shares of the corporation in lieu
5 of interest payments due on debentures and that the company
6 had been advised by counsel that such could not be done
7 unless the shares were first registered. I ask you spe-
8 cifically whether such advice as that was consistent
9 with the advice that you gave the company at or about that
10 time.

11 A Yes. I did not prepare the second page. This
12 was a form of letter which Mr. Duncan had suggested be
13 written according to this memorandum, but the advice is
14 consistent with what I had previously told them.

15 Q Is it an accurate summary of that advice--of
16 these two letters, that your position with respect to ad-
17 vising the company concerning private placements was that
18 they could not be done except on an occasional and isolated
19 basis to a limited number of people who were close--very
20 close to or members of the management of the corporation,
21 so close that any information they wanted about the company
22 they would have free and easy access to or so close that
23 the investment decision was in fact made by a member of
24 management?

25 A Basically not in those terms, but--

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2 Q No, I'm not trying to say those were your
3 words.

4 A But basically those were the extent of my
5 areas of conversations that I covered with management.

6 Q Now, I direct your attention to the schedule
7 of transfers from which you were testifying this morning
8 and I--

9 A Mr. Brewer, may I first point to an arithmeti-
10 cal error? In subdivision (b) on the comments, the last
11 sentence "This occurred on twenty items..." It should
12 have read "This occurred on twenty-five items thus exag-
13 gerating the total by twenty-five persons (twenty trans-
14 ferees; five issuees)."

15 Q I would direct your attention to this copy of
16 that schedule, which I would indicate for the record is
17 identical to the schedule that is already in evidence,
18 schedule of transfers, except that there are placed in
19 ink on this document certain handwritten initials which
20 I will now ask the witness about.

21 Mr. Homans, did you place these initials H.D.
22 O. in the center of the column that is on the righthand
23 side that's under the word "Relationship"? Was this done
24 by you personally, these initials?

25 A Yes.

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2 Q Would you tell me what the H's, the D's and
3 the O's indicate, please?

4 A Well, they were perhaps for my own edification.
5 They were merely a summary of what was said in the relation-
6 ship. The H meant to me the Horsey group. The D meant
7 to me Duncan or Duncan's family group. The O meant to me
8 the persons who were known to, friendly with, partners
9 with management, with the directors and officers of the
10 company and they were in effect a summary of what the
11 relationship in the extended comment was given.

12 MR. BREWER: I would like to offer this copy
13 of that document so marked by the witness into evidence as
14 the defendant's next lettered exhibit. I show it to the
15 SEC.

16 MR. TUCKER: Your Honor, we have no objection
17 to the receipt of this document into evidence. I would
18 only like to ask one voir dire question.

19 THE COURT: Yes.

20 VOIR DIRE EXAMINATION

21 BY MR. TUCKER:

22 Q When did you prepare this listing when you
23 included the initials referred to in the column referred
24 to by Mr. Brewer?

25 A The listing--the entire schedule was prepared

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2 by me sometime ago before I left for California. I was
3 working on that for let me say quite a few days and nights.

4 MR. BREWER: Are you asking Mr. Tucker when
5 he put the little d's, h's and o's on the document?

6 MR. TUCKER: Yes.

7 MR. BREWER: All he wants to know is when you
8 put the h's, d's and o's on the document.

9 THE WITNESS: This morning.

10 MR. TUCKER: While you were here?

11 THE WITNESS: No. While in my office.

12 MR. TUCKER: That's the only question I have,
13 your Honor. We have no objection to its being received in
14 evidence.

15 MR. BREWER: With the Court's permission I
16 would keep a copy of the exhibit, make a copy for the SEC
17 and myself and forward it to the Court.

18 THE COURT: All right.

xxx

19 (Defendant's Exhibit J, received in evidence.)

20 BY MR. BREWER:

21 Q Now, Mr. Homans, I show you again the copy of
22 Defendant's Exhibit J and ask you whether looking at that
23 exhibit as you have marked it, are you in a position to
24 testify from your knowledge and recollection as to whether
25 or not it's accurate to say that all of the transfers

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2 recorded on that schedule and made prior to the retention
3 of Mr. Gedalecia were made to very close family members
4 or very close privies of Mr. Duncan, Mr. Horsey or another
5 member of UMI management.

6 A Pars and Thompson and--

7 Q Including those people as other members of
8 management.

9 A Yes, I believe so.

10 Q Would that same statement be true of all of
11 the transfers made and reflected in that schedule prior
12 to the election of Duncan as president in May of 1968?
13 I ask you to consult, if you wish, the schedule before you
14 answer.

15 A Yes. Substantially so, to a similar extent.

16 Q In what respect would you want to qualify
17 that statement? Who was the transferee prior to the
18 election of Mr. Duncan as president who was not clearly
19 in your mind a member of the board or of management or a
20 very close privy of one of those people?

21 A I'm looking at the interval from March 21,
22 May 17, May 16, 1968 was the date he was elected as presi-
23 dent. I would say in response to your question that the
24 transfers from Mr. Duncan were likewise to persons who
25 were personal friends of management or members of the

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2 family of management or persons who had some close financial
3 interest with Mr. Duncan.

4 Q And that is true of all of the transfers
5 reflected in that, including both transfers and original
6 issuance? All of the transactions reflected in that
7 schedule prior to Mr. Duncan's becoming president fall
8 within that category, is that correct, without exception?

9 A I would say so, yes.

10 Q Now, is it also accurate to say that all of
11 those transactions--and by those transactions I mean those
12 prior to Duncan's becoming president--fell within the
13 scope of the advice concerning private placements which
14 you had provided to UMI management?

15 A Yes. I believe they did.

16 Q Is it accurate to say that during the period
17 of time between the first date indicated on your transfer
18 schedule, which is in March, 1967 when you first met
19 Horsey, and May of 1968 when Duncan became president,
20 there developed between you and UMI management as primarily
21 represented by Horsey an understanding, arrangement
22 or course of conduct with respect to the handling of these
23 incidental private placement transactions; is that an
24 accurate statement; that a course of conduct like that
25 developed between you and UMI management?

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2 A May I amend your statement by saying that
3 they were private transactions rather than private place-
4 ments. I would look at a private placement as such as a
5 different type of transaction. I would say that these were
6 private transactions, and they were in accord with princi-
7 ples, shall I say, which I had given to Mr. Horsey from
8 time to time.

9 Q Is it correct to say that an understanding
10 developed between you and UMI management, i.e. Horsey,
11 with respect to what kinds of transactions could properly be
12 included within this private category; did you have a common
13 understanding on that subject with UMI management?

14 A I believe we did. I did not categorically
15 lay down a manual, so to speak, of what was required, but
16 in my frequent conversations with Mr. Horsey, I would let
17 him know basically from time to time what the requisites
18 were.

19 Q There were a number of transactions which are
20 reflected in your schedule and which took place between
21 March of 1967 and May of 1968; isn't that correct?

22 A I don't have a--you took my copy, Mr. Brewer.

23 Q This is the one that's in evidence.

24 A You took the other copy that I had.

25 Excuse me, you took the other copy without the

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2 initials that I was reading from before.

3 Q Looking at that schedule you can see that
4 there were transfers made between March--the first date,
5 March 21, 1967 and May of 1968. They are listed on page
6 1 and on the first half of page 2.

7 A You are referring to transfers by Mr. Horsey;
8 I think that was your question.

9 Q I'm referring to transfers--there were trans-
10 fers reflected in this schedule between those dates; is
11 that correct?

12 A Yes.

13 Q Is it accurate to say that those transactions
14 took place and were effected pursuant to a course of con-
15 duct or a course of practice which developed between you
16 and UMI management with respect to the handling of those
17 things?

18 A Yes. And these transactions which are set out
19 here, particularly the original issue, were basically with
20 Mr. Duncan and Mr. Duncan's corporation--corporation in
21 the acquisition of his substantial properties.

22 Q And you had no doubt about Mr. Duncan being an
23 insider, did you?

24 A No.

25 Q During that period of time prior to May 16, 1968,

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2 and after March 16, 1967, is it as a general matter accu-
3 rate to say that Mr. Horsey was in charge of the management
4 of UMI?

5 A Well, after Mr. Duncan was elected president--

6 Q No. I am talking about prior to the time when
7 he was elected president.

8 A Mr. Horsey was really--well, I don't know whe-
9 ther to call him the boss or the chief. He had no title of
10 chief executive officer.

11 Q Was he running the company?

12 A But he was running the company and Mr.
13 Sundling, who was president for a brief period, was
14 running the administrative details of the company.

15 Q Is it accurate to say that Mr. Horsey was
16 in effect in charge of UMI's corporate affairs and
17 securities transactions?

18 A I would say in all transactions.

19 Q Is it accurate to say that Mr. Horsey consulted
20 with you on Federal securities law matters as you have
21 just testified; isn't that correct?

22 A To the extent that I testified, yes.

23 Q Yes.

24 It's accurate to say that there was established
25 between you and Mr. Horsey a course of conduct with respect

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2 and a practice with respect to the handling of these pri-
3 vate securities transactions, isn't that correct?

4 A Yes. Mr. Horsey respected what I had indicated
5 was required and I respected the fact that Mr. Horsey
6 respected what I indicated was necessary.

7 Q Is it accurate to say that pursuant to that,
8 the relationship between you and Mr. Horsey on that subject
9 and the practice that developed as a result of the--the
10 transactions were effected that are on that schedule between
11 March of 1967 and May of 1968? Those transactions prior
12 to May 16, 1968 reflected on that schedule took place purr-
13 suant to that arrangement that you had with Mr. Horsey,
14 isn't that correct?

15 A There were very few transactions with Mr.
16 Horsey's transfers. They were all--

17 Q I am talking about all of the transactions
18 that are reflected on that schedule--

19 A That is true.

20 Q Every single one reflected on that schedule
21 prior to May 16, 1968.

22 A That is true.

23 THE COJRT: What's the significance of the
24 day May 16, 1968?

25 MR. BREWER: After that time Mr. Duncan took

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2 over as corporate management. He hadn't had Mr. Homans
3 ~~as his attorney before that;~~
any further, he had Gedalecia after that; and he hadn't
4 followed the advice Mr. Homans had given the corporate
5 management before. He had a different lawyer whose advice,
6 if he solicited it--

7 THE COURT: That's all I wanted to know.

8 I'm sorry I asked.

9 MR. BREWER: I'm glad you asked.

10 THE WITNESS: It's footnoted on page 2, Judge.

11 MR. BREWER: I'm glad you asked that question.

12 THE COURT: I didn't expect to get that
13 involved a response, though.

14 MR. BREWER: I'm sorry, your Honor.

15 Q Now, Mr. Homans, I would like to direct your
16 attention to the time when Mr. Gedalecia was retained as
17 counsel for UMI--securities counsel for UMI in October of
18 1967. Is it accurate to say in that connection that after
19 that time he was the company's exclusive securities law
20 counsel, Mr. Gedalecia?

21 A Yes. I would say so.

22 Q Is it accurate to say--

23 A Well, he was the company's principal securities
24 counsel. ~~including~~ Duncan

25 Q Is it accurate to state that Mr. Duncan did not

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2 consult with you about the application of the Federal
3 securities laws to the company's transactions after that
4 date, the date when Mr. Gedalecia was retained?

5 A Yes, he did, and I can tell you in what regard.

6 Q What's the answer to the question?

7 A The answer is yes.

8 Q No I think is the answer to the question,
9 if I understand it.

10 MR. BREWER: Would you repeat the question?

11 THE WITNESS: How is it phrased? He said
12 is it not accurate.

13 THE COURT: Yes.

14 A Then the answer would be no, except in certain
15 regards.

16 Q Well, would you explain in what respect the
17 statement is accurate and in what respect the statement
18 is not accurate.

19 A Well, it was not accurate in the sense that
20 Mr. Duncan talked to me from time to time about the Form
21 10, which was under preparation by Mr. Gedalecia, why he
22 was filing a Form 10 instead of going ahead with the
23 registration statement for which he had been originally
24 engaged and also from time to time he would ask me about
25 the significance of certain information, for instance,

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2 which Mr. Gedalecia's staff had requested. In that connection I was, you might say, consulted, or I was informed.

4 Q You were asked to explain certain things if
5 you could--

6 A Yes.

7 Q Having to do with what Mr. Gedalecia was
8 doing?

9 A That's right.

10 Q But did Mr. Duncan ever consult you for advice
11 about what to do or what not to do?

12 A No, except to ask me why was Mr. Gedalecia
13 preparing a Form 10.

14 Q I understand about the questions about Mr.
15 Gedalecia. You have explained that. I'm talking about
16 anything other than that.

17 A No.

18 Q Did he consult you on the subject of what
19 the limitations were about private placements or any such
20 matters about what to do in those connections?

21 A Not subsequent to Mr. Gedalecia's retention
22 as securities counsel.

23 Q Was it your understanding that those were
24 matters within the purview of Mr. Gedalecia's activities
25 as securities counsel?

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2 A Quite definitely.

3 Q So it was not surprising to you, was it, that
4 you were not consulted by Mr. Duncan on what to do or
5 what not to do with respect to the securities laws?

6 A No. It was not surprising to me, because
7 I knew that Mr. Gedalecia was the expert--the securities
8 expert who had been retained for that purpose.

9 Q Were the transfers reflected on your transfer
10 schedule that were made after May 16, 1968 when Mr. Duncan
11 became president--were those transactions, the papers with
12 respect to them, forwarded to you and explained to you in
13 the same way as the transactions which had been given to
14 you for processing prior to that?

15 A Yes.

16 MR. PERLMUTTER: I object to the form of
17 the question, your Honor. What way is it referring to?

18 THE COURT: I asked him how they were pro-
19 cessed.

20 MR. BREWER: That was going to be my next
21 question. The first question was were they processed in
22 the same way and the next question was how was that.

23 THE COURT: As long as we get the question
24 answered, I don't care what order you use.

25 Q What was the process by which these transactions

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2 would come to your awareness and come to be handled by
3 you and the opinions issued?

4 A Well, I would receive an instruction letter
5 from the company with reference to the issuance of shares,
6 especially in connection with issuance. The instruction
7 letter would indicate that the shares were to be issued
8 in exchange for working interests or fractional interests
9 in wells. Each instruction letter indicated that it was
10 a private transaction. Each instruction letter was
11 accompanied by a letter of investment representation by
12 the prospective issuee and it was not until I received such
13 a letter of investment representation and the instruction
14 letter that I then issued an opinion to the transfer agent
15 that it was not a public offering, not a distribution and
16 was exempt under the provisions of 4(1) or 4(2), whichever
17 applied.

18 Q So I understand correctly, then, in the case of
19 each transaction, the company described the transaction
20 to you as "private"; is that correct?

21 A That's correct.

22 Q Was that designation by the company the result
23 of the accumulated practice that you have described before?
24 How did they come to use that form, saying this is a
25 private transaction; was that a derivative of the advice

1 rgv 31 Homans-direct

2 and practice that you had described previously that you
3 established with Mr. Horsey?

4 A It would be, in effect, a synthesis of the
5 practice and the requirements which I had described pre-
6 viously to Mr. Horsey and to Mr. Duncan.

7 Q You mean it developed out of that advice and
8 the practice that came from it?

9 A Yes. It wasn't necessary for them to state
10 all the facts and circumstances which would make it a
11 private transaction. I accepted the statement from the
12 company that it was a private transaction, or from Mr.
13 Horsey or Mr. Duncan.

14 MR. PERLMUTTER: Excuse me, your Honor, I am
15 a little bit lost. The instruction letter which Mr. Homans
16 is talking about, is that an instruction letter to you,
17 Mr. Homans?

18 THE WITNESS: It was an instruction letter
19 which was sent to me for transmittal to the transfer
20 agent.

21 THE COURT: Do we have any of those?

22 MR. PERLMUTTER: Right.

23 THE WITNESS: The instruction letter was not
24 addressed to me, Mr. Perlmutter. It was given to me for
25 transmittal to the transfer agent.

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2 MR. PERLMUTTER: It is an instruction letter
3 from the company to the transfer agent; that is what you
4 were referring to?

5 THE WITNESS: Right, and always with a copy
6 to me--for me.

7 MR. PERLMUTTER: Fine. Thank you.

8 Q Do I understand correctly that the use of that
9 designation, private transaction, was a kind of shorthand
10 that developed in the course of your relationship with Mr.
11 Horsey to indicate that as between you and UMI management
12 and you, Arthur Homans, this was a transaction which fell
13 in within the ground rules that you had established with
14 management?

15 A Yes. Yes. May I use a lawyerish term and
16 say that it was a word of art to me.

17 Q As between you and management?

18 A That's right.

19 MR. TUCKER: Excuse me, please, your Honor,
20 a question has come up with regard to the testimony that
21 was just elicited from Mr. Homans.

22 MR. BREWER: Why don't we do that on cross
23 examination.

24 MR. TUCKER: I would only ask that there be
25 some foundation laid for the testimony that the letters

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2 that were being sent by UMI management to the transfer
3 agent through Mr. Homans included a reference to private
4 transaction.

5 THE COURT: That's what I was just looking
6 for now.

7 MR. TUCKER: I don't think we have been able
8 to locate one of them in the ones we have in front of us.
9 Therefore, I would request that if he so testified to that
10 that there be some basis for that testimony.

11 MR. BREWER: Well, do you want to stop the
12 hearing at this point and see if Mr. Homans can find it
13 in his files?

14 THE COURT: We will take a short recess and
15 give the reporter a break, but I just want to look at this--

16 MR. PERLMUTTER: Your Honor, the opinion letter
17 referred to a private placement, however the instruction
18 letter--the opinion letter by the attorney referred to the
19 fact that it was exempt.

20 MR. BREWER: Let me have a copy of this and
21 let me show it to the witness. This is dated August 5,
22 1971. I don't know whether there has been any changes in
23 these.

24 THE WITNESS: What is the question, Mr. Perl-
25 mutter?

2 MR. ERLMUTTER: I do not see anything in the
3 instruction letter--

4 THE COURT: I have found one with respect to
5 Mr. Nardone, which is dated January 12, 1971. It is to
6 Mr. Homans from Mr. Duncan. It says "The following indi-
7 vidual has acquired stock of Universal Major Industries
8 Corporation in a private transaction for investment for
9 his own account and not with a view toward public sale or
10 distribution."

11 That letter does contain that reference, but--
12 there is another one. For example, November 21, 1972, a
13 letter with respect to George Andersen and Annabelle
14 Andersen for 2,083 shares. It makes no mention of it
15 being a private transaction.

16 THE WITNESS: This letter which counsel has
17 handed me states:

18 "The consideration received by the corporation
19 for 9,803 shares referred to above that was--that was to
20 a Mr. and Mrs. Hutchinson--namely working interests in a
21 well, has been duly approved by appropriate corporate ac-
22 tion, etc."

23 In my mind that meant a private transaction.

24 THE COURT: Yes. But this letter from Mr.
25 Duncan to the stock transfer company says:

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2 "This will serve as your instructions and
3 authority to issue 2,083 shares of common stock of Univer-
4 sal Major Industries Corporation, one cent par value, in the
5 following name, George Andersen and Annabelle Andersen.
6 The consideration received by the corporation for said
7 shares has been duly approved by appropriate corporate
8 action and the shares will be fully paid and non-assessable."

9 There is no mention there that it was a pri-
10 vate placement.

11 MR. BREWER: Maybe some clarification can be
12 made from Mr. Homans.^{1/2} Prior testimony and from this
13 schedule. If I remember correctly the Andersen transac-
14 tion was in exchange for one form of security that he was
15 trading for another form of security; isn't that correct?

16 THE WITNESS: That is right.

17 MR. BREWER: And the form of security that he
18 was trading for was one of these fractional interests in
19 the wells.

20 THE COURT: Why don't you let Mr. Homans
21 testify to it, if that's the case. We will take a short
22 recess.

23 THE WITNESS: It is on--

24 THE COURT: It is not reflected in the letter,
25 that's the point.

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2 MR. BREWER: We will deal with that after the
3 recess.

4 (Recess taken.)

5 Q Mr. Homans, before the recess the Court pointed
6 out from examining documents in evidence that the instruc-
7 tions to the transfer agent with respect to Mr. Nardone,
8 who was a prior witness, do contain the words private sale,
9 or words involving the word "private," but that the corres-
10 ponding papers with respect to the transaction involved in
11 the case of Mr. George Andersen, who was also a witness,
12 as you will recall, do not contain those words, private
13 transaction or private sale.

14 Can you explain with respect to the nature of
15 the transaction involving Mr. Andersen's case why it was
16 that without those words being present, the letter never-
17 theless indicated to you that it was a so-called private
18 transaction?

19 A Well, the fact that it was an exchange of
20 property, namely working interests in a well or wells in
21 exchange for stock in the corporation.

22 THE COURT: Where does it say that? In the
23 letter to--

24 MR. BREWER: Could we show the witness the
25 document with respect to Andersen?

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2 THE COURT: Yes. There are two letters with
3 respect to Andersen. One was addressed to Continental
4 Stock Transfer Company, dated November 21, 1972, and the
5 other is addressed to Mr. Homans and is dated November 22,
6 1972.

7 The letter addressed to the stock transfer
8 company--

9 THE WITNESS: Of which I received a copy.

10 THE COURT: Of which you received a copy,
11 states:

12 "The consideration received by the corporation
13 for said shares has been duly approved by appropriate
14 corporate action and the shares will be fully paid and
15 non-assessable."

16 It doesn't make any mention of it being an
17 exchange for profit. The letter to you says:

18 "The following individuals have purchased
19 common stock of Universal Major Industries Corp. from
20 the company, George Andersen and Annabelle Andersen."

21 THE WITNESS: How many shares was that, Judge?

22 THE COURT: The same amount, 2,083 shares and
23 it encloses the original agreement executed by the Andersens.

24 In either case does it say that these shares were being
25 transferred for interests in wells or anything else?

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2 The letter to you says they have purchased
3 the stock and the letter to the stock transfer agent says
4 that the consideration received by the corporation has
5 been duly approved.

6 MR. BREWER: Could I see those documents,
7 your Honor?

8 THE COURT: Sure.

9 Q I am showing you, Mr. Homans, these documents
10 and I ask you if there is anything about these papers that
11 indicate to you that, as I believe Mr. Andersen testified,
12 he was exchanging his interest, ⁱⁿ I believe it was Banner Oil
13 for shares of stock or if there is indeed anything else
14 about those papers that would indicate to you that this
15 was a private sale.

16 A The only thing I can say about this particular
17 transaction--

18 Q I'm talking about the Andersen transaction.

19 A On the Andersen transaction, the consideration
20 received by the corporation for said shares would indicate
21 that the corporation did receive cash or property as the
22 consideration. However, this particular transaction happens
23 to be one of the--almost the latest of opinions that I
24 furnished to Continental and I believe I was told at the
25 time that this was a conversion of Banner shares. It was

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2
3 then--or subsequently that I advised them that I would not
4 issue any additional opinions on conversions of Banner
5 shares and subsequent opinions on conversion of Banner
6 shares were issued by Mr. Gedalecia on Banner interests--
7 fractional interests, not Banner shares.

8 Q So this transaction was an odd one--an unusual
9 one in that connection?

10 A In that it made no mention particularly of
11 a working interest or a private transaction.

12 Q But you knew it was made for exchange of
13 interests in Banner Oil and you made no more of those;
14 is that correct?

15 A I knew that it was made in ~~for~~ exchange for the
16 working interest. When I learned later that it was a
17 Banner Oil working interest, I declined to issue any fur-
18 ther opinions on Banner Oil and I did not.

19 Q Now, Mr. Homans, I show you a group of transfer
20 documents similar to those involved in the case of Mr.
21 Andersen and Mr. Nardone which included among them a letter
22 dated November 22, 1968 from UMI to you with respect to this
23 transaction, which involved, among other people, Mr.
24 Leonidoff, Nieanadoff, I believe, and I ask you if this letter--

25 MR. PERLMUTTER: Excuse me. What exhibit are

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2 you reading from?

3 MR. BREWER: This is not an exhibit. Mr. Homans -
4 got it out of his files as illustrative of what he was
5 talking about.

6 Q I show you that letter and the documents to
7 which it is attached and ask you if you can recognize them
8 and to say what they are.
A

9 A Yes. This is an explanatory letter following
10 an instruction letter which had been given to me concern-
11 ing some transfers made by Mr. Duncan in which the invest-
12 ment letters are enclosed, and it refers, or states:

13 "Enclosed are investment letters received
14 with reference to some Universal Major Industries Corp.
15 private sales made by Mr. Duncan. I am holding back the
16 stock of Dennis James noted in my letter of September
17 20, 1968, as I have not yet received his investment
18 letter" and the investment letter was subsequently received.

19 In this connection I even have Mr.--Mr. Horsey
20 was one of the transferees. I even had an investment
21 letter from Mr. Horsey before I issued the stock to him.

22 MR. BREWER: Could we have this document
23 identified as the Defendant's next lettered exhibit,
24 please.
25

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xxx 2 (Defendant's Exhibit K, marked for identifi-
3 cation.)

4 THE COURT: I was just checking on the Andersens.
5 I see the Andersen's were the last ones listed in Exhibit F,
6 which you ~~testified~~ about this morning, and also that Mr.
7 Andersen--I assume it is the same Andersen--

8 MR. BREWER: It is, your Honor.

9 THE COURT: Received 1,500 shares from Duncan
10 back in--on July 22, 1971.

11 THE WITNESS: That is right, yes. That was a
12 direct transaction with Mr. Duncan. The last one on
13 December 8t', the odd number, 2,083, indicated an exchange
14 for working interest.

15 MR. BREWER: The SEC is looking at that
16 exhibit now that I am about to offer.

17 Any objection?

18 MR. PERLMUTTER: No.

19 MR. BREWER: I offer that as Defendant's
20 Exhibit K in evidence, without objection.

21 xxx (Defendant's Exhibit K, received in evidence.)

22 Q Now, Mr. Homans, with respect to those docu-
23 ments which I just showed you, do I understand correctly
24 that the statement in those documents is typical of the
25 references to which you referred in your earlier testimony,

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2 that is references in the documents referred to a private
3 transaction and ~~to~~ ^{ed & code} that indication as accompanied, word to
4 you referring back to your arrangement with UMI management
5 on that subject?

6 A Yes.

7 Q Now, do I also understand correctly that with
8 respect to certain of those transactions in which the na-
9 ture of the transaction was such, that the consideration
10 was an interest in a well or another form of security of
11 UMI or one of its affiliate corporations, and there was
12 a change of the form of the security, that, in the case of
13 those other transactions, the nature of the underlying con-
14 sideration involved you considered to be information indi-
15 cating the private nature of the transaction?

16 A Well, usually on all transactions involving
17 exchanges for working interests, the letter did state
18 that it was an exchange for working interests. There may
19 have been one or two letters with an omission of that par-
20 ticular fact, but I assumed that where there was an exchange
21 for working interests, that it was a private transaction.

22 In other words, a whole bunch of participants
23 didn't come in and say we want shares of stock for our well
24 interests whether there were 25 or 50 or 90 people. Each
25 transaction was a negotiated transaction; it was a separate

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1 mdsr

13

2 Also, there is no procedure advising the offeree
3 or the purchaser of securities that he must bear the
4 economic risk for an indefinite period of time by holding
5 his securities because the securities are unregistered.

6 If the Court rules the testimony of Mr. Anderson at this
7 trial, Mr. Anderson testified that he did not know that
8 his securities were restricted and that he had to hold the
9 securities for a certain time period before he could sell.

10 Nowhere do the procedures proposed by the defendant
11 enunciate these type of restrictions which would go to the
12 Section 4.2 exemption.

13 Also, I may add the procedures that the defendant
14 proposes is that he would submit a file including the pro-
15 posed opinion letters to an attorney acceptable to and
16 approved by the SEC. The Commission does not want to get
17 into the position of approving Mr. A to be an attorney that
18 is acceptable to it who will oversee Mr. Homans' writing
19 of opinion letters.

20 Also, the defendant proposes to submit periodically
21 to the Commission all his opinion letters. I am sure Mr.
22 Homans is of course acting in good faith in his proposal.
23 For Commission reasons --

24 THE COURT: It seems to me he can act in good
25 faith within the proposed order.

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2 MR. PERLMUTTER: As we proposed it, your Honor,
3 yes.

4 THE COURT: If he wants to set up procedures,
5 that may very well be desirable.

6 MR. PERLMUTTER: Fine, he can set up the proce-
7 dures.

8 THE COURT: But I don't know whether the Court
9 can put its imprimatur on various procedur-. If I do
10 that, every time I have somebody before me in these cases
11 I will be setting up a code for them to follow in the
12 future, and I will be glad to go over these things in
13 further detail, but it seems to me that he is adequately
14 protected under the proposed order. If he has now made
15 a study, he now knows what the present law is and then he
16 can proceed within the framework of the Commission's order.

17 Otherwise, we would have an order of ten or fifteen
18 pages long citing the various procedures that should be
19 followed and he can come in and argue to the Court that the
20 fact he may have violated a statute or some rule he should
21 be held only to the standard set up in the Court's order.
22 I cannot see that. The law may change next week.

23 MR. BREWER: If I may reply to the point your
24 Honor just raised, first of all we do not maintain that there
25 is anything legally defective or wrong with the SEC proposed

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15

2 order, and we do not maintain --

3 THE COURT: So far as it being an indication
4 of good faith, I am glad to see it, but we are talking really
5 now about what we put in an order, not what representations
6 Mr. Homans makes as to his future conduct and standards
7 he intends to follow.

8 Actually, he may want to even impose, as the law
9 develops, stricter standards.

10 MR. BREWER: Yes, indeed, your Honor. The point
11 I would like to make in response is simply one that is made
12 in our reply brief that the Court may not have had an op-
13 portunity to examine, and it is that there is no intention
14 here -- the SEC has simply misunderstood our intention here--
15 by us to set up Court-promulgated regulations in competition
16 with the SEC's rules or with other Court decisions or any-
17 thing of the like, of that kind. There is no intention to
18 set up procedures Mr. Homans could use in any way as a
19 defense or justification if he were subsequently accused
20 of other statutory violations. The only purpose here is
21 to --

22 THE COURT: If such a case, you have to add to the
23 provisions -- for example, you would have to have some state-
24 ment after enjoining him from violating Section 5A by some
25 statement without any limitations on the foregoing.

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16

2 MR. BREWER: We would have no quarrel with that,
3 your Honor. Our intention is not to limit the foregoing.

4 THE COURT: I still am not inclined to incorporate
5 all of this in an order.

6 MR. BREWER: I can understand the Court's re-
7 luctance, your Honor. I can only state that our purpose --

8 THE COURT: As I say, it certainly has to
9 indicate that the prime part of the order was a flat
10 injunction from violating Section 5A. We mention writing
11 and furnishing opinions, and so forth, and then without
12 any limitation on the foregoing it is further ordered that
13 writing, furnishing and rendering opinions as to the availa-
14 bility of any applicable statutory exemption the defendant
15 shall --

16 MR. BREWER: We will have no problem with that,
17 your Honor.

18 THE COURT: I still do not like it.

19 MR. BREWER: I can understand that, your Honor.
20 I have to say, your Honor, that it is -- even though I am
21 not the prevailing attorney in this case it is always an
22 extreme pleasure to argue a case before your Honor because
23 we know the Court makes an effort to consider all arguments
24 in an open-minded way.

25 THE COURT: I am sorry they do not always come

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1 mdsr

17

2 out in your favor, but there is always an appeal. I will
3 be glad to go over it and consider it, but at the very most
4 I would have to make it very clear that any violation of 5A
5 is enjoined, without describing writing opinions or any-
6 thing else.

7 I am prepared to take the suggestion as evidence
8 of Mr. Homans' good faith, but I am not inclined to put it
9 in an order.

10 MR. BREWER: Our purpose may have been served in
11 that respect, your Honor.

12 One point of clarification. We have made a motion
13 that the record be deemed open.

14 THE COURT: It is open to reflect the statement
15 which Mr. Homans made which the Court gratefully receives
16 and it is closed and I hope it is closed forever.

17 [Time noted; 12:00 p.m.]

18 * * *

19

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FINAL JUDGMENT OF PERMANENT INJUNCTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

SAME TITLE

73 Civil 3626 (CHT)

-----X

Plaintiff Securities and Exchange Commission ("Commission") having filed its Complaint and all other papers in this action, and this Court having jurisdiction of the parties and of the subject matter of this action, and after an evidentiary hearing on a motion for a preliminary injunction having been consolidated, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, with a trial on the merits, and such trial having been concluded, and this Court having rendered its Opinion, dated July 11, 1975, which constitutes this Court's Findings of Fact and Conclusions of Law, as required by Rule 52 of the Federal Rules of Civil Procedure, in which it was found that permanent injunctive relief is appropriate against the defendant Arthur J. Homans, it is hereby

ORDERED, ADJUDGED AND DECREED that defendant Arthur J. Homans, his agents, servants, employees, attorneys, and those persons acting in concert or participation with them, and each of them, be and are hereby permanently enjoined from, directly or indirectly, in the absence of any applicable statutory exemp-

FINAL JUDGMENT OF PERMANENT INJUNCTION

tion, violating, or aiding and abetting the violation of, Section 5(a) of the Securities Act of 1933, 15 U.S.C. 77e(a), by:

- (1) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell, through the use or medium of any prospectus or otherwise, the common stock of Universal Major Industries Corp., or any other security, unless and until a registration statement is in effect with the Commission as to such securities;
- (2) carrying or causing to be carried through the mails or in interstate commerce, by any means or instruments of transportation, the common stock of Universal Major Industries Corp., or any other security, for the purpose of sale or delivery after sale, unless and until a registration statement is in effect with the Commission as to such securities.

s/ Charles H. Tenney
United States District Judge

Dated: New York, New York
August 28, 1975

JUDGMENT ENTERED - 9/2/75

s/ Kaymond F. Burghardt
CLERK

NOTICE OF APPEAL OF DEFENDANT ARTHUR J. HOMANS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

73 Civ. 3626 (CHT)

UNIVERSAL MAJOR INDUSTRIES CORP.,
JAMES G. DUNCAN
TRANSAMERICAN PETROLEUM CORPORATION
ROY M. HORSEY
BANNER OIL AND GAS FUNDS, INC.
IAN McCARTNEY
ARTHUR J. HOMANS
EDWARD G. GEDALECIA,

Defendants.

-----X

Notice is hereby given that defendant Arthur J. Homans
appeals to the United States Court of Appeals for the Second
Circuit from the Final Judgment of Permanent Injunction herein
entered against said defendant on September 2, 1975.

Dated: New York, N. Y.
October 30, 1975

BREWER & SOEIRO

by s/ Bradley R. Brewer
Bradley R. Brewer
A Member of the Firm
Attorneys for Defendant
Arthur J. Homans
257 Park Avenue South
New York, N. Y. 10010
(212) 777-4010

TO: WILLIAM D. MORAN
Regional Administrator
Attorney for Plaintiff
Securities and Exchange Commission
New York Regional Office
26 Federal Plaza
New York, N. Y. 10007

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Julio VALLEJO, JR, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 2742 Pitkin Ave
Brooklyn New York (11208).

That on the 12th day of July, 1976,
deponent personally served the within Appendix of Plaintiff Appellee
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

By depositing true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

William J. Moran
Regional Administrator
Attorney for Plaintiff-Appellee
26 Federal Plaza
New York, N.Y. 10007

Julio Vallejo, Jr

Sworn to before me this

12th day of July, 1976

Lorraine L. Fexas

LORRAINE L. FEXAS
Notary Public, State of New York
No. 41-1205620
Qualified in Kings County

Commission Expires March 30, 1976

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2 transaction.

3 Q Negotiated separately with the holder of
4 that interest by the company?

5 A That is right.

6 Q For the purpose of acquiring that particular
7 interest in an oil well, or gas well or whatever it was?

8 A That is right.

9 Q Now, with respect to the transfers--by that
10 I mean all the transactions--reflected on your transfer
11 schedule after Mr. Duncan became president, was it your
12 understanding or impression that Mr. Duncan was consulting
13 with Mr. Gedalecia as securities counsel concerning the
14 appropriateness of the passing on of those transactions
15 to you for submission to the transfer agent?

16 A Well, I was under the impression that he was
17 constantly consulting with Mr. Gedalecia and that they
18 were passed on to me for the purpose of an opinion as
19 corporate counsel.

20 Q By that I take it--do you mean that it was
21 your impression that Mr. Gedalecia had already implicitly
22 passed on them although there was no opinion by him
23 attached?

24 MR. PERLMUTTER: Objection.
25

THE COURT: I will sustain the objection.

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1 rgv 44 Homans-direct

2 Q What was your understanding of the process
3 which preceded the forwarding of those documents to you
4 by Mr. Duncan, or his office?

5 A I knew that Mr. Duncan was in constant communica-
6 tion with Mr. Gedalecia or Mr. Chicofsky, his partner.
7 Based on that I assumed that when these requests came to
8 me, that they had been shall I say approved by the Gedalecia
9 office, or indicated that there was no objection by the
10 Gedalecia office.

11 Q As a physical matter that office was the same
12 place as the corporation's offices; is that right?

13 A For a time. Not during the entire period.
14 I think the sequence of events was that a small suite
15 opened up in the same building, 342 Madison Avenue, and
16 the quarters being a little crowded, UMI represented or rented
17 sublet that separate suite on a different floor. Subse-
18 quently they moved to Hidden Valley Ranch in Kingston and
19 maintained a small New York office in the Chanin Building
20 for public relations or whatever, but all their corporate
21 records were then transferred to Kingston.

22 Q Was it also your understanding that those
23 documents were submitted to you on the same basis and sub-
24 ject to the same limitations as they had been when Mr.
25 Horsey was running the management of the company?

1 rgv 45

Homans-direct

2 A I felt that that was the case, yes. 70.

3 Q After Mr. Gedalecia's retention you were not
4 paid as such for securities law advice; is that correct?

5 A I have so testified.

6 Q Mr. Homans, did you become aware at any time
7 before you ceased to represent UMI, which was I believe on
8 the 15th of January, 1973--did you at any time prior to
9 January 15, 1973 become aware of any facts which caused
10 you to doubt that the transfers being submitted to you
11 were being submitted pursuant to the understanding that
12 you had originally established with UMI management and Mr.
13 Horsey?14 A I did not become aware of any such facts,
15 with these exceptions:16 In the conversion of debentures into stock,
17 I insisted upon an opinion from Gedalecia, the special
18 SEC counsel, which are transmitted by cover letter to the
19 transfer agent. Also on the issuance of stock in lieu of
20 interest on the debentures, I insisted upon an opinion
21 from Mr. Gedalecia, special SEC counsel, which in my
22 cover letter to the transfer agent I transmitted.23 Q Yes, but I don't believe--or at least it wasn't
24 intended to. My question was not intended to cover any
25 transfers with respect to which Mr. Gedalecia rendered a

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30.

2 formal opinion. I had intended to limit my question just
3 to the transfers covered by your transfer schedule that
4 you have been testifying from.5 The question was, whether with respect to those
6 transfers covered by that schedule you became aware at any
7 time prior to January 15, 1973, of any facts which caused
8 you to believe or to doubt that the transactions being
9 given to you were not being given pursuant to your origi-
10 nal arrangement and understanding with Mr. Horsey and the
11 UMI management as run by him?12 A I would say that I first began to have some
13 doubts about March 23rd of 1973, which was after I had
14 terminated my services and I had those doubts when I was
15 visiting with Mr. Tucker at the SEC regional office. Prior
16 to that time we had, upon request of both the Washington
17 office and the branch chief and the regional office
18 furnished--

19 Q Of the SEC?

20 A Of the SEC.

21 At that time I think there was a Mr. Estricher
22 who was on the staff in the regional office--23 MR. PERLMUTTER: Your Honor, if I may inter-
24 rupt, the witness is not being responsive to the question.
25 The question was--

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4 THE COURT: When did he first--

5 MR. PERLMUTTER: When did he first become aware
6 that the arrangement that he had with Mr. Horsey, which I
7 believe the testimony was in early '67, was not in fact
8 being conducted in that manner.

9 THE WITNESS: That is not the question.

10 MR. BREWER: That was not the question. The
11 question was, did he ever become aware of any facts that
12 indicated to him that it wasn't being followed.13 MR. PERLMUTTER: As I understand the arrange-
14 ment that he had with Mr. Horsey, it was that, one, the
15 shares would be issued to a limited number of people; two,
16 they would have access to the financial information, and
17 three, there would be closeness to management.18 As I understand it that's the arrangement. Now,
19 the question being asked was at any time did you become aware
20 that shares were being transferred or issued which were
21 not pursuant to that arrangement and as to his knowledge
22 in March of '73 that he filed something with the--that
23 something was filed prior with the SEC around it seemed
24 that that may have been okay because the SEC may not have
25 commented on it.

I don't see the relevancy to the question.

THE COURT: I don't know that--I think he said

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3 that he first became aware that the Horsey arrangement
4 was not--had not continued to be carried out in March of
5 '73 in connection with, I assume, the Commission's inves-
6 tigation.7 Then I suppose he can say what he became aware
8 of. He has answered the question. He said in March of
9 1973.10 Now, maybe you should ask him another question
11 of how he became aware of it and then he can answer that.12 MR. BREWER: That's my understanding of the
13 record.14 A I think the question was when did I first have
15 doubts. Wasn't that the word you used?16 Q No. I asked prior to January 15th when you
17 quit being counsel for UMI and became aware of any facts
18 and then I believe, you said no and then you volunteered
19 that you first became aware of any facts in March of 1973.20 I will now ask you how it was that you did be-
21 come aware of some facts or information, if you ever did,
22 that caused you to doubt that the Horsey arrangement had
23 been implemented by UMI throughout.24 When did you become aware of such facts, if
25 you ever did?

THE COURT: March of '73. He already answered

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4 that.

5 Q How did you become aware of that?

6 THE COURT: Now give him a chance to answer
7
8 the other.9 A Well, by a position in the interview taken by
10 Mr. Tucker with reference to the overall number of persons
11 involved over the period of four years, the overall number
12 of shares involved over the period of four years, at which
13 I pointed out to Mr. Tucker that, number one, they were
14 over a period of four years; they were isolated transactions;
15 they were not lumped involving a public offering, as such.16 Each transaction involved an investment rep-
17 resentation. Each transaction involved legended restricted
18 shares, restricted from further transfer and each trans-
19 action involved an investment stop on the transfer agent's
20 records.21 MR. PERLMUTTER: Your Honor, again I move that
22 the witness is not being responsive to the question be-
23 cause he has given justifications for his issuance as
24 opposed to reasons as to how he came about to have doubts.25 THE COURT: He is saying two things at once,
but that's all right.

A May I amend that?

Q If you wish.

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3 A Now that I recall, my first having doubts was
4 at the time when Mr. Tucker--I think it was Mr. Tucker who
5 called Mr. Duncan down for interrogation, which would have
6 been in October, 1972. At that time I did not represent
7 UMI but attended with Mr. Duncan, as a matter of personal
8 courtesy to him. I had suspended service to UMI between
9 July and November of '72 and then finally terminated in
January of '73.10 Q Were you aware at the time when the transac-
11 tions happened of the facts indicated in your transfer
12 chart--transfer schedule of the source of certain trans-
13 actions as having been introductions made by either Mr.
14 Burda or Mr. McCartney?

15 A No.

16 Q You were not aware of the activities of Mr.
17 Burda or Mr. McCartney with respect to the offering of
18 stock to people among whom were Mr. George Andersen and
19 his wife; is that correct?

20 A No. I was not aware.

21 Q Does that statement apply equally to the other
22 transactions indicated on your schedule where the schedule
23 indicates introduced by Burda or introduced by McCartney?24 A Well, there was one other, and that was Harold
25 Bach, who did introduce very few people to Mr. Duncan for

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2 stock transactions.

3 Q Were you aware of the Bach introductions?

4 A No. I was only aware of Mr. Bach's personal
5 relationship with the company.

6 Q How did you become aware of the McCartney or
7 Burda sources of those transactions, was it in connection
8 with the preparing of the schedule or with a suit or how
9 did that happen?

10 A It was in connection with the preparation for
11 the hearing.

12 Q This hearing?

13 A Yes. These hearings.

14 Q And it was not until that time that you became
15 aware of those facts; is that correct?

16 A That is right.

17 Q Looking back at the transactions reflected in
18 your transfer schedule after the time in May of 1968 when
19 Mr. Duncan became president, do you have a view or an
20 opinion with respect to whether or not there came a time
21 when your arrangement with Horsey had ceased to be followed
22 by UMI management with respect to those transactions with-
23 out your knowledge?

24 A I don't understand the question, Mr. Brewer,
25 please.

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2 Q As you look back at that schedule of transfers--
3 and I ask you to do so--and you look at the asterisk on the
4 second page--the two asterisks in the middle of the second
5 page, which indicate a point in time at which Mr. Duncan
6 became presiaent--do you see that on the second page?

7 A Yes.

8 Q Mr. Duncan became president on 5/16/68. And
9 then as you look through that schedule--at the transfers
10 which happened after that and you see--you begin to see on
11 page 3 at the top the name of Burda, and then as you turn
12 the pages you see at the top of page 4 Mr. Burda's name.
13 Does that suggest to you now in retrospect that a time
14 may have arrived in the course of these transactions when
15 transfers were referred to you on a different basis than
16 your understanding with Horsey?

17 A Yes. Had I known at the time of the relationship
18 with Burda, or the relationship with McCartney, I might have
19 questioned these transactions a little more carefully.

20 They did appear to be more numerous in the year
21 following Mr. Duncan's reelection as president--or election
22 as president, but, still, they were, as I see it, separate
23 and isolated transactions and in no way, in my view, to
24 be construed as a public offering.

25 Q Looking back on those transactions, does it

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appear to you that Mr. Duncan was applying the terms of your arrangement with Mr. Horsey as Mr. Horsey had applied it?

A Now? Looking back now?

Q From your mind now looking back at it.

A I don't know. It would be entirely possible to assume that during that period Mr. Duncan may have stepped out of--shall I say out of bounds or out of the limits of the understanding that I had with him.

Q If he did, you didn't know that he was doing so at the time, did you?

A No, sir. I do not intend by that statement to accuse him of doing anything that's out of line.

Q Now, Mr. Homans, with respect to your present practice in securities law and with respect to--well, I would ask you to consider that in your mind for a moment and to consider the prior testimony in which you testified, I believe, that you have at present only three clients who have publicly issued stock.

A Four.

Q Four.

I believe you testified that with the exception of UMI--is that one of the four?

A No.

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Q Excluding UMI, that all of those four clients have involved on your part the issuance of private placement opinion letters with respect to fewer than forty recipients?

A Yes. I did so testify as an approximation.

Q In the entire history of your practice of securities laws from 1951, I believe, to 1973; is that correct?

A Well, actually the rendering of opinions, shall I say, began with '67. I had no call for the rendering of opinions prior to that time, even though I was doing some securities work.

Q I would now like you to make an estimate, if you would, of how many private placement opinions you might be--that is how many recipients would be covered by the private placement opinions which those four corporations would in your estimation be asked to require of you over the next let's say three years?

MR. PERLMUTTER: I object to the question, your Honor.

THE COURT: Sustained.

MR. BREWER: Your Honor, I respectfully submit one of the issues which this Court will have to consider--

THE COURT: This is to the likelihood of his

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2 repeating these offenses in the future.

3 MR. BREWER: Yes. What I am trying to get at
4 here is the proper situation that he doesn't even have--

5 THE COURT: His opinion isn't even going to
6 control. We are not going to get through today, are we?
7 I can see that.

8 MR. BREWER: Not if there is going to be
9 significant cross examination, but I would assume there is.

10 MR. TUCKER: I would at this time seek to find
11 out from Mr. Brewer as to how long he intends to continue
12 the direct examination of Mr. Homans. We have cross
13 examination to do, but it is somewhat limited. I believe
14 we can do it rather quickly if he is near the close of his
15 direct examination.

16 MR. BREWER: I am near the close of it, yes.

17 THE COURT: All right, I will let him answer
18 the question so we can get ahead. I must say, though,
19 his estimate of what is likely that he would do in the
20 way of opinion letters is not necessarily controlling.

21 MR. BREWER: No, of course it isn't neces-
22 sarily controlling, your Honor.

23 THE COURT: We usually don't deal in prophecies
24 here, but--

25 MR. BREWER: He has testified on what he has

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2 been called to do for those clients for the past--

3 THE COURT: I will let the witness answer the
4 question because we are taking up more time with colloquy.

5 A Mr. Brewer, I can only answer that, as the
6 Judge indicated, that I have no crystal ball, but on the
7 basis of what clients have asked of me in the past, I can
8 estimate what their requirements might be in the future.

9 In the case of one client, I have issued and
10 been requested for no opinion letters at any time and I
11 have represented this client since 1962.

12 In the case of another client whom I have
13 represented since 1968, I have been asked only for perhaps
14 a half-dozen opinion letters relating to stock being issued
15 to employees under a qualified stock pension plan relating
16 to two rule 154 opinions by an insider for the sale of
17 1% of his stock in two six-month periods and the third
18 insider under 154 for a sale of 1% of the outstanding,
19 no transfers, except a recent transfer in which one con-
20 trolling stockholder sold all his stock to step away
21 from the company to the other controlling stockholder.

22 In a third company I have issued perhaps a
23 dozen opinions since 1968, all for transfers within
24 family groups as gifts and all for original issues where
25 the corporation acquired other corporations in exchange

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2 for stock.

3 With reference to the fourth corporation, I
4 have issued two, one who I have represented since March,
5 1970. I have issued two rule 133(d) opinions for 1% be-
6 cause of a--resulting from a merger under rule 133 which
7 was then in effect and is no longer in effect and I have
8 issued perhaps a dozen opinions of transfers made by in-
9 siders to members of their family as gifts at year-end for
10 the purpose of taking advantage of certain tax advantages.

11 Yes, and one more opinion on October 30th of
12 1973 to a single stockholder of an acquired company. In
13 all cases restricted shares.

14 The only shares which were freed up, so to
15 speak, were the two 133 (d) opinions and the two 154
16 opinions.

17 Q Just incidentally, did you ever free up any
18 stock of UMI, that is free it from the restrictive legend
19 and from the stop order with the transfer agent?

20 A Except for the transaction involving a nominal
21 amount of about 1,000 shares or 2,000 shares, which had
22 been given to a lawyer who represented Mr. Duncan in Los
23 Angeles, Donald Smaltz, who furnished to me an opinion of
24 very prestigious counsel in Los Angeles, a firm, and who
25 indicated special services--special circumstances in which

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2 he had left his association with Keating & Sterling and
3 was opening his own office in Los Angeles and he needed
4 the funds after an ownership of two years, or three years
5 and I freed up those shares.

6 Other than this transaction I have no recol-
7 lection of having freed up any shares involved in this
8 schedule.

9 Q Based upon the experience you have just des-
10 cribed with your four remaining clients you have who have
11 stock outstanding with the public, is it your best estimate
12 at this time that such opinions as--private placement
13 opinions as you might be called upon to render in the
14 future by those corporations would be of the same charac-
15 ter at approximately the same rate per year as those re-
16 quests have been in the past?

17 A I would think so. I know of no circumstances
18 at this time which would change that ratio.

19 Q Mr. Homans, I would just like for you
20 briefly to go back over your academic record, your
21 professional--

22 THE COURT: It's already in the record, isn't
23 it?

24 MR. BREWER: I don't believe his professional
25 associations are, your Honor.

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THE COURT: We are going to adjourn in about five minutes.

A I received by AB degree from Columbia College in 1926; my LLB from Columbia in 1928. I was admitted to the bar in December, 1928. I am a member of the Association of the Bar. Excuse me, Judge.

THE COURT: I think we better take a little time on this.

We will adjourn.

MR. BREWER: I am afraid the witness is getting rather emotional. I would like to request a recess.

THE COURT: Yes, we will adjourn.

I will try and fix it when I can pick this up again. I can't say right now. If I find something happens with this other case, which is--

THE WITNESS: Judge, I have to be in California in March and I would not like to go under the same strain and tension that I had coming back.

THE COURT: I am starting a case, a securities criminal case. It is going to go for two months, probably. I wouldn't worry about the month of March.

THE WITNESS: Okay.

MR. PERLMUTTER: Your Honor, in all fairness to the SEC, I believe we have established a prima facie

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case for at least a preliminary injunction. I do request at this time, if the case is going to be adjourned, that we do get at least a preliminary injunction based on the evidence that has been testified to so far.

MR. BREWER: That is most vigorously opposed, your Honor.

THE COURT: I am not too sure of that.

THE WITNESS: Do you know what a preliminary injunction will do, Mr. Perlmutter?

THE COURT: No. The application is denied at this time, but I will try and get to it as fast as I can.

(Adjourned sine die.)

- - -

4 MR. BREWER: That was the registration statement
5 which Mr. Gedalecia had been retained to file promptly
6 in 1967. It wasn't filed until two years later, and then
7 it never became effective and was ultimately withdrawn.

8 THE WITNESS: It wasn't filed until four years
9 later, Mr. Brewer.

10 The only statement I wish to make, Judge, is the
11 following, and in referring to my illness I do not do so to
12 influence the Court or gain the Court's sympathy, but
13 merely to point out the chronology of the entire matter.

14 Some time prior to June 28, 1973, I was advised
15 by Mr. Tucker that I might be a potential defendant or
16 target, as he called it, in an action against UMI for
17 injunctive relief. At that time he gave me a copy of SEC
18 Release No. 5310, if your Honor is familiar with that.

19 THE COURT: It will have to be marked as an
20 exhibit.

21 THE WITNESS: All right.

22 Which set out the procedure under which such
23 "target" would be permitted to submit a statement of his
24 position and exculpating facts.

He told me no decision had been arrived at as to

4 On June 28, 1973, he advised me that I would be-
5 included as a defendant. I immediately telephoned Mr.
6 Moran and made an appointment to see him on Tuesday,
7 July 3rd. In the early morning hours of July 1, 1973, I
8 was taken to the New Rochelle Hospital and placed in the
9 intensive coronary unit.

10 On Monday, July 2, 1973, my brother telephoned
11 Mr. Moran's office to cancel our appointment because of
12 the circumstances. Subsequently, Mr. Tucker telephoned
13 my office to inquire the name of the hospital and the
14 name of my doctor, which my secretary furnished.

15 A few days later, he telephoned and spoke to my
16 brother, who advised him that the hospital reported my
17 condition as critical. Mr. Tucker, on a conference
18 speaker telephone, advised him that because of my condition
19 I would be dropped as a defendant in the suit against UMI.

On August 20, 1973, one day before the papers
were filed in court, and while I was convalescing at home,
my brother was informed that I would be included after all
as a defendant in the Section 5 count, but I would not be
named as a defendant in the fraud count, which is what
transpired. I was not named in the fraud count.

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2 When my brother pointed out that this was

3 a reversal of the previous decision not to include me

4 at all, he was advised that Washington had directed that

5 I be included.

I give this chronology for two reasons:

7 One, to show that I was never given an
8 opportunity under Release No. 5310 to submit a statement of
9 my position and exculpatory facts; and

10 Two, that if the regional office had decided
11 that I was not a necessary party for relief against UMI, I
12 should not have been included as a defendant at all.

As to the merits, I firmly believe, with all
sincerity and humility, that I was never reckless, careless
nor negligent, even under the new standard in this Circuit,
in furnishing my own opinions; that I did precisely what
Judge Kaufmann in his opinion indicated a careful lawyer
should do to prevent distribution of unregistered shares.

I never issued an opinion until I had an investment letter in hand. On each occasion I instructed that the shares be legended so as to restrict further transfer, which was done. On each occasion, I instructed that a stop be placed on the transfer agent's records, which was done. I never freed up, in the vernacular, any shares as was done in large quantities in the Schiffman and Fields

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2 cases, except in one or two instances for nominal amounts
3 of shares based on other counsel's opinions and special
4 circumstances.

5 On all the evidence, I submit that the drastic
6 remedy of injunction, temporary or permanent, is not
7 warranted in this case, especially in view of the
8 horrendous consequences which would ensue for me in the
9 suspension from securities practice.

I submit that my conduct in this case does not warrant such result after forty-five years of practice with an impeccable reputation.

13 Since it would, in effect, cause my retirement
14 under humiliating circumstances.

15 Most of my practice is as corporate counsel for
16 public corporations, and this would terminate my ability
17 to earn a livelihood.

4B 1 mbrl

Homans

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2 THE COURT: All right.

3 MR. TUCKER: Your Honor, now that this
 4 matter has become a part of the record, we would request
 5 just a short opportunity to put a somewhat opposing state-
 6 ment on the record with regard to the earlier matter.

7 Certainly the latter matter goes to the merits of this case
 8 and I think that is a matter to be decided after briefs
 9 and findings of fact are submitted.

10 MR. BREWER: No objection at all, your
 11 Honor, to the SEC putting in whatever they think is
 12 appropriate.

13 THE COURT: Sure, fine, well I would expect
 14 them to.

15 THE WITNESS: Do you wish, Mr. Brewer, the
 16 53 then should be submitted as an exhibit, the release
 17 that I have reference to?

18 THE COURT: Since you made reference to it --

19 MR. BREWER: It's a part of the law of the SEC.
 20 I don't think we need make it part of the record.

21 THE COURT: All right. I don't care. The
 22 government may want to make it part of the record.

23 MR. BREWER: You want it in? Put it in.
 24 I don't care.

25 THE COURT: It's referred to in his statement.

OPINION OF HON. CHARLES H. TENNEY, D.J. DATED JULY 11, 1975

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

-----X
 SECURITIES AND EXCHANGE COMMISSION :

Plaintiff, : 73 Civ. 3626 (CWT)

-against- :

UNIVERSAL MAJOR INDUSTRIES CORP. :
 JAMES G. DUNCAN
 TRANSAMERICAN PETROLEUM CORPORATION :
 ROY M. HORSEY
 BANNER OIL AND GAS FUNDS, INC. :
 IAN McCARTNEY
 ARTHUR J. HOMANS :
 EDWARD G. GEDALECIA :

Defendants. :

-----X OPINION

TENNEY, J.

This action for injunctive relief, tried to the Court, involves the liability of an attorney, Arthur J. Homans, for aiding and abetting his client's violation of Section 5 of the Securities Act of 1933 ("the Securities Act"), 15 U.S.C. § 77e.

The Securities and Exchange Commission ("S.E.C.") brought the instant action for preliminary and permanent injunctive relief against the defendant Homans and seven other defendants (three corporations and four other individuals)^{1/} for violation of Section 5 of the Securities Act, and against four of those defendants,^{2/} not including defendant Homans, for violation of the anti-fraud provision of that statute, 15 U.S.C. § 77q(a), and Section 10(b) of the Securities Exchange Act of 1934 ("the

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Exchange Act"), 15 U.S.C. § 78j(b). Seven of the defendants named in the complaint consented to the entry of permanent injunctions against them. The trial^{3/} of this matter therefore involved only that portion of the complaint directed to defendant Homans, who was an attorney for the defendant Universal Major Industries Corp. ("UMI") during the relevant period.

The pertinent portions of the complaint allege that Homans has been engaged, is engaged, and will, unless enjoined, continue to engage in acts and practices which constitute and aid and abet violations of Section 5(a) and (c) of the Securities Act (Complaint ¶ 1). More specifically, it is alleged that, beginning in September 1967 and extending into February 1973, the common stock of UMI was sold or transferred to the public in large quantities, although no registration statement had become effective (Complaint ¶¶ 14, 16), and that these sales were carried out by making use of the means and instruments of transportation or communication in interstate commerce and of the mails (Complaint ¶ 15). The complaint further alleges that

"17. All unregistered common stock of UMI was issued in conjunction with various opinions of counsel as to the legality of the transactions. The opinions were rendered by the defendant Homans and the [firm to which Edward G. Gedalecia, another defendant named in the suit, belonged].... Each such opinion of counsel rendered by Homans or [Gedalecia's] firm represented that the issuance of UMI common stock to which the opinion pertained, was exempt from registration under the Securities Act pursuant to either Section 3(a)(9) or 4(2). In fact, the aforementioned offers, sales, and delivery after sales of UMI securities

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were not exempt under Section 3(a)(9) or 4(2), or any other section of the Securities Act, which fact the defendants Homans and Gedalecia knew, or in the exercise of reasonable care should have known."^{4/}

After an unsuccessful motion to dismiss the complaint, the Court proceeded to take evidence regarding the allegations directed to Homans. As the hearing progressed, and as confirmed by the S.E.C. after trial,^{4/} Homans' liability under the Securities Act is now limited to the claim that he aided and abetted others in violating the Act by having written 206 letters which asserted directly or indirectly that the issuance and sale from September 1967 through February 1973 of over 3 million shares of UMI common stock to over 600 persons was exempt under either Sections 3(a)(9), 4(1) or 4(2) of the Securities Act, when he knew or should have known that UMI was engaged in a public offering and distribution of its securities for which a registration statement should have been filed.

Homans contests liability on a multiplicity of grounds. In particular, he claims that there was no need to file a registration statement with respect to the securities in question because the sales were "private transactions."^{5/} Second, he argues that, even if the securities in question should have been registered, his activities could not be classified as aiding and abetting a violation of Section 5 of the Securities Act since he had no knowledge and could not have reasonably known that his letters--which he claims were not "opinion" letters--would be

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used in furtherance of an unlawful scheme. Additionally, Homans argues that issuance of a permanent injunction, in light of the facts and circumstances of the case and in view of the potential damage to his professional career, would be an abuse of discretion.

The following constitute this Court's findings of fact and conclusions of law:

A. Background Facts

1. UMI

The corporation whose common stock was allegedly distributed in violation of the registration requirements of the Securities Act--^{6/}UMI--is a Nevada corporation with its principal place of business in New York. From 1959 through August 1966, UMI was controlled by Leonard Ashbach. In August 1966, James G. Duncan conveyed all of his interest in a corporation known as Duncan Oil and Chemical Corporation to UMI, in exchange for which he received UMI stock. As a result of this transaction, both Duncan and Ashbach became the controlling shareholders of UMI, with equal voting control. Duncan Oil and Chemical Corporation, then engaged in exploration for oil and gas, acquisition of acreage under lease, and drilling and operation of wells, became a UMI subsidiary.

In March 1967, owing to a dispute between Ashbach and Duncan, Ashbach relinquished his equity in UMI to a group of in-

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dividuals headed by Roy M. Horsey ("the Horsey group"). From that date until May 1968, the Horsey group was engaged in the day-to-day management of the corporation. From May 1968 and thereafter, daily management of the corporation was lodged in Duncan.

2. Homans' relation with UMI

Homans first became associated with UMI in 1959, around the time Ashbach--who had known Homans since 1944--became its controlling shareholder. Homans' position at that time was general or corporate counsel to UMI. In that capacity, he acted as an advisor to the corporation in both matters of general corporate and securities law. He continued in that capacity when, in 1966, Duncan purchased a one-half controlling interest in UMI and into and past March 1967, when his friend, Ashbach, terminated his relationship with the corporation.

It was not until October 1967 that Homans claims that his relationship with UMI materially changed. It was in that month, according to Homans, that UMI decided to retain special securities counsel. He claims that he was instructed that, ^{7/}then on, he (Homans) was to perform legal services for the corporation as corporate counsel only and that all securities work would henceforth be left to Gedalecia. ^{7/}Homans also claims that he was instructed that any reimbursement for securities work he might occasionally be asked to do would be rendered

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separately, on a per diem basis. In fact, he never received any per diem reimbursement for services rendered in connection with UMI's securities activities. Finally, he contends that the simultaneous decision of the Board to move their corporate offices to Gedalecia's firm was connected with the decision to retain Gedalecia as securities counsel.

The minutes of the meeting of the Board of Directors of October 26, 1967 (Def. Exh. E) suggest a different explanation of the events. It appears that Gedalecia and his firm were retained, at least initially, "to undertake the filing of a registration statement on behalf of the Corporation with the Securities and Exchange Commission...." (Id. at p. 2). Moreover, the real reason that UMI decided to move its corporate offices to Gedalecia's office was that UMI's rent payments for the office which it then maintained were in arrears. (Id. at p. 6). The move to Gedalecia's office was viewed as "temporary", to last until the registration statement had been filed and until UMI had found "permanent" offices. (Id. at p. 6). The minutes make no mention of the fact that Homans was thereafter to refrain from advising UMI on securities matters. In view of the activities in which Homans thereafter engaged, see discussion Part C infra, it is probable that the minutes reflect the true state of affairs. However, inasmuch as Homans' liability is based not upon his title, but upon the acts which he performed, see discussion Part D-2 infra, the Court need not decide whether

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Homans' explanation is accurate.

In any event, Homans continued to work for UMI until January 15, 1973, with the exception of a short hiatus (July through November 1972).

It should also be noted that, from August 1970 until October 5, 1971, Homans served as Secretary on UMI's Board of Directors. However, his liability under the Securities Act is based upon his activities as an attorney for UMI, and not upon the fact that he served on the Board.

E. The Securities Transactions

1. Description

During the relevant period, UMI's capital structure was composed of three tiers: (1) 6% convertible debentures; (2) 7% convertible debentures; and (3) common stock. No registration statement was ever filed with respect to either debenture issue. In March 1971, UMI filed a registration statement covering the issuance of 1,921,000 shares of UMI common stock; however, that statement never became effective.
^{8/}

Between April 1967 and December 1968, UMI issued approximately \$3,500,000 of its 6% convertible debentures to approximately 425 transferees. Between November 1966 and November 1968, UMI issued approximately \$440,000 of its 7% convertible debentures to approximately 26 transferees. These particular transactions are not directly at issue in this suit; however, they

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form the basis for some of the allegations directed to Homans.

The securities transactions which Homans is alleged to have aided and abetted in violation of Section 5 of the Act are: (1) issuances of common stock by UMI upon conversion of the 6% and 7% debentures; (2) issuances of common stock by UMI for interest on the 6% and 7% debentures; (3) issuances of common stock by UMI in exchange for cash, interests in oil and gas properties, or services; (4) transfers of UMI common stock by Roy M. Horsey; and (5) transfers of UMI common stock by Duncan and by Transamerican Petroleum Corporation ("Transamerican"), a corporation wholly owned by Duncan. The approximate number of shares involved are set forth in the margin.^{9/}

2. Transferees

Although it is likely that UMI stock was offered to persons and entities other than those which actually received the stock,^{10/} Homans claims that, while he was connected with UMI, he had no knowledge of any such offers. We turn, then, to a discussion of those who actually received UMI common stock as a result of the types of transactions described above.

There is no question that some of those who received UMI common stock during the relevant period were "insiders", e.g., members of UMI's management and/or controlling stockholders. However, transfers were also made to persons with only the most tangential connection to UMI or with no connection at all.

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Two transferees testified at trial. The first, Faust Nardone, purchased 5,000 shares of unregistered UMI common stock from Duncan on January 4, 1971. At the time of his purchase, he was employed by the Board of Education of the City of New York as a carpenter foreman. He had only a slight connection with UMI.^{11/} The second transferee, Georg Andersen, an architectural designer, purchased (with his wife) 1,500 shares of UMI common stock on July 22, 1971. He, too, had only the most tenuous connection with UMI,^{12/} but became interested in the company after talking with his neighbor, Ian McCartney, a UMI employee.

Homans himself testified as to the identity of a great many of the persons and entities which received UMI common stock during the relevant period.^{13/} He testified that, in addition to the transfers made to members of UMI's management and their immediate families, transfers were also made to business associates of members of management, personal acquaintances of members of management, persons who held fractional interests in wells in which UMI or members of UMI's management also held interests, and persons and entities which had performed services for the corporation.

The transferees' knowledge of the securities world and of UMI's business varied. Obviously, those transferees who were members of management, those transferees for whom management made the investment decision, and those other transferees who were generally acquainted with the ups and downs of securities

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investments and who otherwise had easy access to UMI management stood the best chance of understanding the nature of their investments in UMI and the relative risks involved. However, there were others whose knowledge and understanding of what was involved could only be characterized as minimal.

Thus, Mr. Nardone, although concededly an investor in high risk securities and a person who followed the stock market, was not a "sophisticated" investor.^{14/} He testified that he approached UMI (or, more correctly, Mr. Duncan) for the purpose of investing in UMI unregistered common stock after attending a UMI stockholders meeting at which "Mr. Duncan had charts, and put them up on the bulletin board and he started showing all the projections, and all the projections showed up and up and up."^{15/} Nardone testified that he had no understanding of the charts.^{16/} He signed an "investment letter" which he did not understand.^{17/} Mr. Andersen testified that, although Mr. McCartney, who introduced him to UMI, elaborated on the company's affairs,^{18/} Andersen did not fully understand him. He too testified that he did not understand the import of the "Investment letter" which he was asked to sign. Indeed, he did not recollect whether there were any restrictions on the securities which he had purchased.^{19/}

It is not at all clear from the record what kind of information was made known to a prospective transferee or what kind of information would have been made known to one had he

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inquired. Certainly, there was no proof that there was any uniform attempt to present transferees with the sort of information which UMI would have had to have made available had the corporation registered its securities.^{20/}

C. Homans' Activities in Connection with the Securities Transactions

1. The Letters

The S.E.C. alleges that Homans wrote a total of 206 "opinion letters" in connection with the five types of transactions described in Part B-1 supra, and that these letters were instrumental in furthering the issuance and sale of over 3,000,000 shares of UMI common stock to over 600 transferees. Homans, on the other hand, contends that the letters, which he concededly wrote, were nothing more than cover letters or "transmittal letters."

For purposes of convenience, the letters can be classified as falling into one of two categories: Form-1 letters and Form-2 letters.

According to Homans, Form-1 letters, used in reference to the issuances of common stock upon conversion of debentures and in lieu of cash interest upon the debentures, are on their face "transmittal letters". Such letters were written under Homans' letterhead and were addressed to UMI's transfer agent. Exhibit 3 is a typical Form-1 letter. It reads:

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"I refer to the attached letter of instructions from the authorized officers of Universal dated May 13th, 1968, with reference to the issuance of common stock of Universal upon a conversion of certain outstanding debentures of Universal.

"With respect to the issuance of shares in accordance with the conversion provisions of the debentures, I am enclosing herewith copy of a letter of opinion from (Gedalecia), who (is) special counsel for Universal, bearing date March 11th, 1968.

"The undersigned renders no opinion as to the original sale or issuance of the debentures which are presently presented for conversion, but I rely on the opinion of (Gedalecia) to the effect that the conversion of the debentures and the issuance of the stock upon such conversion, in and of itself, does not constitute a violation of the Securities Act.

"However, I call to your attention that it will be necessary to place an appropriate investment stop on your records and to place an appropriate legend upon the face of the certificates of stock to be issued."
(Emphasis added)

The Form-1 letters always accompanied a letter from Gedalecia or his firm addressed to UMI. Exhibit 3A, typical of Gedalecia's letters, reads:

"This refers to your question respecting the conversion into stock of outstanding debentures of Universal in accordance with the provisions contained therein.

"In view of the fact that the debentures and the underlying stock into which they are convertible were in our opinion, sold in transactions violative of Section 5 of the Securities Act of 1933, as amended (as well as the Trust Indenture Act) the conversions at this time, as proposed, would not constitute additional violations of the Act."

See also Exhs. 4, 4A, 5, 5A.

The other type of letter, used in reference to all of

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the other transactions, was also typed under Homans' letterhead and addressed to UMI's transfer agent. According to Homans, these Form-2 letters were also "transmittal letters" in the sense that, although they ostensibly contained an opinion from Homans, they were really mere codifications of Gedalecia's opinion, relayed to Homans either by Gedalecia or by a member of UMI management after speaking with Gedalecia. Exhibit 6, typical of such Form-2 letters, reads:

"Reference is made to the accompanying letter dated January 30th, 1970, from Universal Major Industries Corp., instructing you to issue a total of 15,750 shares of the common stock of Universal to the persons designated in said letter.

"I am counsel to Universal and I submit the following opinion to you. I have examined the minute books of the corporation and other relevant documents and on the basis of the foregoing, it is my opinion that the issuance of these 15,750 shares have been duly approved as required by law; and that all appropriate action necessary for the issuance of such shares has been taken. It is therefore my opinion that such shares, when issued, will be regularly issued, fully paid and non-assessable.

"You are further advised that these shares have not been registered under the Securities Act of 1933. Therefore, you are requested to place an appropriate notation to the effect that further transfer of these shares is restricted except under applicable rules and regulations of the Securities and Exchange Commission. You are further requested to place an appropriate legend on the certificates themselves to the same effect.

"You are further advised that the corporation has received from the persons named so called 'investment letters' in form approved by the undersigned, to the effect that they are acquiring the said shares for investment only and not for public sale or distribution.

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"It is my opinion therefore that the issuance of such shares is not in violation of the Securities Act of 1933, nor of the rules and regulations of the Securities and Exchange Commission." (Emphasis added)

The "Form-2" letters, it should be noted, did not contain any enclosures from Gedalecia. See also Exh. 7A.

To classify either form of letter as a "transmittal letter" is an understatement. The "Form-2" letters speak for themselves. The fact that such letters were purportedly written under Gedalecia's direction does not negate the conclusion that any third party receiving such a letter would have reasonably concluded that Homans, as an attorney, was expressing his own opinion as to the legality under the Act of a particular issuance or transfer of stock.

The Form-1 letters, similarly, could reasonably have been understood as expressing an opinion, albeit one made "in reliance upon" another's opinion, as to the legality of the issuances which they covered. If, as Homans contends, such letters were merely intended to serve as "transmittal letters", it is difficult to understand why such letters were written on Homans' stationery (or, indeed, why Homans, an attorney, wrote any such letters), why such letters directed the issuance of restricted and appropriately legended stock, and why such letters contained a statement indicating that Homans relied upon the opinion of another.

OPINION OF HON. CHARLES H. TENNEY, D. J., DATED JULY 11, 19752. The Claimed Exemptions

Of the total of 206 letters which Homans admittedly wrote, either on his own or in reliance upon Gedalecia, 82 of them, written between May 16, 1968 and May 1970, covered the issuance of 1.1 million shares of UMI's common stock to approximately 250 debentureholders for conversion of their 6% and 7% debentures. Those 82 letters were of the Form-1 type, i.e., Homans indicated that he was relying upon an opinion of Gedalecia, contained in a letter to UMI dated March 11, 1968. That letter, quoted supra, stated that, although the issuance of the underlying debentures was violative of the Act, the conversions and issuances upon conversion would not constitute violations of the Act. Although the March 11, 1968 Gedalecia letter does not state upon which section of the Act that conclusion was based, it appears that it was based upon Section 4(2) of the Act. ^{21/}

Another 36 of the letters covered the issuance from about August 21, 1969 to June 18, 1971 of approximately 270,000 shares of UMI common stock to approximately 300 debentureholders in lieu of cash as interest on debentures. These letters were written between June 1969 and February 1971, and like the 82 letters discussed above, were Form-1 letters, this time based upon one of seven opinions that had been rendered by Gedalecia or his law firm. Six of the seven Gedalecia opinions relied upon Section 3(a)(9) of the Act, while the seventh relied upon Section 4(2) of the Act.

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The remaining 88 letters, all of the Form-2 variety, covered issuances of UMI common stock for cash, services and property (46 letters) and UMI common stock transferred to others by Duncan, Transamerican, and Horsey (42 letters). In the case of the former, Homans relied upon Section 4(2) of the Act; in the case of the latter, he relied upon Section 4(1) of the Act.

3. Procedure under which Homans issued the letters

Homans testified at great length as to the procedure he followed before writing any letter, whether of the Form-1 or Form-2 type, to UMI's stock transfer agent.

First, he testified that, before Gedalecia became special securities counsel for the corporation, Homans had instructed management as to the proper procedures which must be followed with respect to securities transactions involving unregistered UMI securities, transactions which he referred to as "private transactions". These instructions, which Homans called an "understanding", provided that unregistered securities could only be transferred to persons closely and intimately related to members of UMI management; that all prospective transferees were to be furnished with whatever financial information they required; that all prospective transferees were to be screened as to their relative "sophistication"; and that in all instances, prospective transferees were to be instructed that the stock ^{22/} which they would receive was "restricted", unregistered stock.

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Second, he testified that he would never write any letter to Continental unless he had received (1) a letter from UMI authorizing the issuance or transference of the stock, (2) information indicating that the transaction was a "private" one or one involving an "exchange for working interests" and (3) a letter ("investment letter") signed by the prospective transferee indicating that the transferee was acquiring the stock for investment purposes only; that the transferee would not dispose of the shares unless and until UMI's counsel was of the opinion that they could be so disposed; that the transferee understood that the shares were unregistered; and that the transferee had been furnished "with such financial and other data relating to [UMI] and its business which [the transferee] considered necessary and advisable to enable [him] to form a decision concerning [his] acquisition."^{23/} UMI's use of the term "private transaction" would indicate to Homans that the transaction was one negotiated under and in compliance with the terms of the understanding he had with management. UMI's use of the term "exchange for working interest" also meant to Homans that the transaction was a private one: the transferee was a "partner" or "joint venturer" with UMI in a well or wells; the transferee was a "sophisticated investor", having been sufficiently "sophisticated" to have invested in oil and gas ventures for tax purposes; the transferee had approached UMI and had offered to "swap" his interest in an oil or gas well for an interest

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in a corporation with numerous wells and acreage; and the deal had been separately and individually negotiated as to price on a "one-shot" basis.

Crediting Homans' testimony as to the procedure he followed, it should be noted that Homans never instructed management that every prospective transferee was to be provided with the sort of information that UMI would have had to divulge had it complied with Schedule A. Additionally, Homans testified that, although from time to time, he had an opportunity to meet prospective transferees and that, on other occasions, he recognized the names of transferees as persons whom he would consider "insiders", it was not his regular practice to look behind any of the representations made to him.

4. The function of Homans' letters in the distribution of UMI common stock

The conclusion that both the Form-1 and the Form-2 letters were what are commonly known as "opinion letters" is bolstered by the testimony of Joseph Lowe, a vice-president of Continental Stock Transfer Corporation ("Continental"), the company which acted as UMI's stock transfer agent during the relevant period. Lowe testified that it was Continental's practice before taking any action to require (1) a letter from UMI authorizing the issuance or transfer of stock and (2) a second letter containing an opinion from UMI's designated counsel as to the legality of the issuance or transfer. He further

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testified that, had Continental received a letter from Gedalecia without an accompanying letter from Homans, i.e., a Form-1 letter, it would not have issued or transferred any shares. The reason was that UMI had never formally advised Continental that it could rely upon Gedalecia's opinion.

Homans claims that he was unaware of Continental's "internal" policies. His claimed ignorance strains credulity. The very fact that Homans continued to write such letters to Continental long after Gedalecia was retained as special securities counsel ^{25/} belies that contention. Moreover, his testimony as to the circumstances under which he would send such letters negates his claim. As indicated earlier, he testified that he would never issue any letter to Continental unless he had in hand an investment letter from the potential transferee, as well as information, in the form of a letter or an oral communication, to support the conclusion that the transfer was a "private transaction" or an "exchange for working interest." Additionally, he was always careful to provide in his letters that the stock transferred was to be "restricted" and appropriately legended. In other words, all of his actions were consistent with the conclusion that he had knowledge that his letters were considered opinion letters and that they were a condition precedent to the issuance or transfer of UMI common stock. Whether he had direct knowledge that his letters were likely to be used in furtherance of an unlawful distribution is a slightly different question,

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which the Court now addresses.

5. Homans' State of Mind

Homans contends that he had no knowledge of any illegal distributions of UMI stock and, furthermore, that, in light of all of the circumstances, he could not reasonably have concluded that such was the case. He contends that it was not until he had terminated his relationship with UMI and the S.E.C. had begun to investigate UMI's securities dealings that he discovered that UMI might in fact have been engaging in illegal distributions of its common stock.

Homans suggests that, after Gedalecia had been retained and after Duncan had taken over management of the corporation, the understanding which Homans says he had with UMI management was surreptitiously abandoned, but that, in view of his relationship with Duncan and with Gedalecia, he could not have reasonably discovered that fact earlier.

As Homans describes it, Duncan (with whom Homans did not share a close relationship) abandoned the understanding by authorizing UMI employees, e.g., McCartney, to solicit prospective transferees. Such prospective transferees, Homans now concedes, did not always have that degree of sophistication or relationship with UMI which even Homans would have considered sufficient to warrant an exemption under Section 4(2). However, because management continued to represent to him that the transfers were "private transactions" or "exchanges for working interests" and

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continued to forward to Homans signed "investment letters" from prospective transferees, Homans claims he had no reason to suspect that his instructions to management were not being followed. Homans further claims that it was reasonable for him to assume that Gedalecia was supervising the day-to-day implementation of his instructions since Gedalecia was purportedly expert in such matters, UMI had removed its corporate offices to Gedalecia's office, and Homans had been directed to stay out of such matters.

In light of certain other evidence adduced at trial, however, the Court must conclude that, in some circumstances, Homans knew and, in other circumstances, had reason to know that his client was engaging in illegal distributions of its common stock and that his letters were being used to further those distributions. To reach that conclusion, we must retrace our steps.

In March 1967, the UMI Board of Directors authorized a "private placement" of 6% convertible debentures in the face amount of \$3 million. At the time the proposal came before the Board, Homans understood that 25% of the placement was to issue to Duncan in exchange for Duncan's having transferred to UMI his interests in certain oil and gas wells. Based upon that understanding and upon other information to the effect that the remainder of the placement was to go to a limited number of individuals, Homans believed that the debentures could be distributed without filing a registration statement.

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Within two weeks prior to October 27, 1967 (the date Gedalecia was retained), however, Homans learned that the 6% convertible debentures were being issued to "numerous" or "substantial" numbers of persons in exchange for their fractional interests in oil and gas wells, so that it now appeared to him that the original debenture issue should have been registered. He apparently informed UMI management of his reservations and it is quite probable that the retention of Gedalecia shortly thereafter was causally connected to Homans' communication, *i.e.*, it is probable either that management, unhappy with Homans' suggestion that the debenture issue be registered, decided to look elsewhere for advice more amenable to its objectives or that, alternatively, Homans himself requested the retention of other counsel for the specific purpose of handling the delicate matter of the debenture issue. Whatever the true facts may be, Homans was clearly on notice as of October 1967 that his client could not be trusted in matters involving the distribution of its securities.

The story does not end there. UMI continued to sell the unregistered debentures as late as December 1968 without filing a registration statement. Additionally, UMI decided that it would issue UMI common stock for conversion of, or in lieu of cash interest upon, the debentures. Homans claims that he told management he would not write an opinion authorizing issuance of common stock in those instances and demanded that management

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^{26/} obtain the opinion of other counsel for that purpose. Had Homans been ignorant of the fact that such distributions of common stock (based upon earlier illegal distributions of the debentures) were themselves illegal, it is difficult to understand why he would have insisted upon an opinion from other counsel. That he knew he might be held liable for aiding an illegal distribution is buttressed by the fact that, although Homans blithely issued Form-2 letters regarding the legality under the Securities Act of other transfers of UMI common stock, he specifically used the Form-1 letter when asked to communicate with Continental regarding the issuance of stock upon conversion of or in lieu of cash interest upon the debentures.

Knowing that, on at least one occasion, his client had proceeded to distribute common stock where the underlying stock transaction was itself illegal, his failure to investigate the numerous other representations made to him regarding the other transfers of common stock cannot be defended as reasonable under the circumstances. Although there is no direct proof that he had knowledge that such transactions were illegal under the Securities Act, his policy of relying upon the representations made to him without any investigation might be viewed as a calculated attempt to avoid liability based upon such knowledge.

Additionally, the claim that Homans reasonably relied upon Gedalecia to ensure UMI's compliance with the Securities Act is undercut by the fact that the very first opportunity he

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had to observe Gedalecia's work revolved around the issuance of common stock upon conversion of the 6% debentures. Homans admittedly relied upon Gedalecia's "opinion" that the issuances, although not accompanied by registration, were lawful under the Act. (Exh. 3). That "opinion", if that is what it can be called, provided in pertinent part that:

"In view of the fact that the debentures and the underlying stock into which they are convertible were in our opinion, sold in transactions violative of Section 5 of the Securities Act of 1933, as amended (as well as the Trust Indenture Act) the conversions at this time, as proposed, would not constitute additional violations of the Act." (Exh. 3A).

Starting from the proposition that the letter is itself a non sequitur and remembering that Homans had by this time concluded that the debentures had been issued unlawfully, so that issuance of common stock upon conversion was impossible without registration, it cannot be said that Homans was justified in assuming that Gedalecia was competent to advise UMI and that Gedalecia was adequately supervising UMI's compliance with the Securities Act.

D. Liability

1. Illegal Distributions

Homans is charged in this injunctive proceeding with having aided and abetted others in violating Section 5 of the Act. That section provides in pertinent part:

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"(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly --

(1) ... to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce ... any such security for the purpose of sale or for delivery after sale.

...

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell ... through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security...."

The purpose of this section is "to protect investors by requiring registration with the Commission of certain information concerning securities offered for sale." Gilligan, Will & Co. v. S.E.C., 267 F.2d 461, 463 (2d Cir.), cert. denied, 361 U.S. 896 (1959). The sort of information which would be disclosed upon registration is set forth in Schedule A, 15 U.S.C. § 77aa.

There are certain limited instances where, in the opinion of Congress, registration is not required. Thus, Section 3 of the Act, 15 U.S.C. § 77c, lists certain classes of securities for which a registration statement need not be filed. Section 4 of the Act, 15 U.S.C. § 77d, defines in broad terms those transactions in securities which need not be accompanied by registration. Those two sections, however, are to be strictly construed,

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S.E.C. v. Continental Tobacco Co. of S.C., 463 F.2d 137, 155 (5th Cir. 1972). To establish a prima facie violation of Section 5, the S.E.C. must establish that (1) no registration statement covering the securities in question was in effect; (2) the securities were sold; and (3) the sale was carried out by the use of interstate communication or transportation and the mails. Id., at 155-56. Once those elements are established, the burden shifts to the party claiming the benefit of an exemption under Sections 3 or 4 to establish that a statutory exemption was in fact available.^{27/}

Therefore, the first point of inquiry is to determine whether the S.E.C. has established the elements of a prima facie case. That the S.E.C. has met its burden under Section 5(a) is clear from this Court's findings of facts, Part B-1, supra.

There was more than enough evidence to show that UMI common stock for which no registration statement ever became effective was sold in interstate commerce through the use of the mails.

15 U.S.C. § 77e(a). Thus, our inquiry shifts to a determination of whether those sales were exempt under Sections 3(a)(9), 4(1) or 4(2) of the Act--the sections cited by Homans either directly or indirectly in the Form-1 and Form-2 letters which he wrote to Continental.

There is little point in discussing whether any of the sales of stock were exempt from registration by virtue of Section 3(a)(9) and 4(1). In his proposed findings of fact and post-trial

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briefs, defendant makes little effort to establish their applicability.^{29/} It is clear that the major exemption upon which defendant relies is that contained in Section 4(2) for "transactions by an issuer not involving any public offering."

Defendant's understanding of Section 4(2) is somewhat novel. He contends that the sales of unregistered UMI common stock all fell within that section because the sales were not a part of a single, integrated public offering, but were, rather, separately negotiated private transactions. (Def. Post-Trial Memorandum of Law, p. 57). Thus, defendant spends a substantial amount of time trying to establish that the sales were not part of the same issue,^{30/} and that in each instance the sale was conducted privately and the price was separately negotiated. Although it is clear that, by making this argument, defendant hopes to squeeze under the "private offering exemption", his understanding of that exemption and its relationship to Section 5 of the Act falls far from the mark.

Although Section 4(2) does not define the meaning of the phrase "public offering", the case law defining this phrase is now rather extensive. There is, for example, the seminal case of S.E.C. v. Ralston Purina Co., 346 U.S. 119 (1953), a case with which defendant never really comes to grips in his post-trial papers. That case and the cases which have followed make it crystal clear that it is not the manner in which a sale of unregistered securities is effected, but rather the class of

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persons to whom such securities are offered which determines whether the Section 4(2) exemption is available.

The issue before the Court in the Ralston Purina case was whether a particular offering of defendant's stock to key employees who had solicited ^{31/} such stock constituted an exempt transaction under Section 4(2). Among the "key employees" to whom defendant's stock was sold were an artist, bakeshop foreman, chow loading foreman, clerical assistant, copywriter, electrician, stock clerk, mill office clerk, order credit trainee, production trainee, stenographer, and veterinarian. Id. at 121. The Court concluded that:

"[T]he applicability of [the exemption] should turn on whether the particular class of persons affected needs the protection of the Act. An offering to those who are shown to be able to fend for themselves is a transaction "not involving any public offering." Id. at 125.

Thus, an offering to "executive personnel who because of their position have access to the same kind of information that the Act would make available in the form of a registration statement" might come under the Section 4(2) exemption. Id. at 125-26. In other words,

"the governing fact is whether the persons to whom the offering is made are in such a position with respect to the issuer that they either actually have such information as a registration statement would have disclosed, or have access to such information." Gilligan, Will & Co. v. S.E.C., supra, 267 F.2d at 406.

A few additional points are in order. First, it would

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appear that, when deciding whether the Section 4(2) exemption is available, inquiry should be directed to the class of those who were offered stock, not simply to those who did in fact purchase the stock. S.E.C. v. Ralston Purina Co., supra, 346 U.S. at 125; S.E.C. v. Continental Tobacco Co. of S.C., supra, 463 F.2d at 161.

Second, it would appear that the mere fact that the offering is made to a limited number of persons is not dispositive.

"[T]he Ralston Purina case clearly rejected a quantity limit on the construction of the statutory term It stated that 'the statute would seem to apply to a "public offering" whether to few or many,' 346 U.S. at page 125, 73 S.Ct. at page 984, and cited with approval the dictum that 'anything from two to infinity may serve: perhaps even one' * * * ' 346 U.S. 125, 73 S.Ct. 985 and note 11." Gilligan, Will & Co. v. S.E.C., supra, 267 F.2d at 467.

Third, evidence that the stock sold is thereafter "restricted" and that the purchaser has signed what is commonly known as an "investment letter" would not exempt an offering which was otherwise "public".

"Although such precautions are taken by issuers relying on the exemption of section [4(2)] to ensure that their purchasers shall not in turn distribute securities to others who might not have 'access to the kind of information which registration would disclose,' even though the initial purchasers possessed such information, 'these are only precautions [to prevent illegal distributions] and are not to be regarded as a basis for exemption from registration.' United States v. Quaker Caramel Wafer Corporation, 376 F.2d 675, 679 (4th Cir.), cert. denied, 389 U.S. 850 (1967) (citation omitted; emphasis added).

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Finally, the mere disclosure of the same information as would be disclosed in a registration statement to all persons offered unregistered stock would not, in the absence of showing that the offerees had the requisite relationship with the issuer and the ability to fend for themselves, suffice to form the basis for an exemption under that section. S.E.C. v. Continental Tobacco Co. of S.C., supra, 463 F.2d at 160.

Measured against the rules just cited, it must be concluded that the sales of UMI common stock covered by defendant's Form-1 and Form-2 letters should have been accompanied by an effective registration statement.

First, defendant failed to establish that UMI common stock was not offered to persons other than those who actually received it for value. Although he claims that he had no knowledge of any offers being made, the record suggests that such was the case. Without this crucial piece of information, the Court has no way of determining whether the "class of persons affected" (emphasis added) needed "the protection of the Act." S.E.C. v. Ralston Purina Co., 346 U.S. at 125.

Second, defendant failed to establish that all of those who purchased UMI common stock or received stock for value belonged to a class of persons who could "fend" for themselves. Although some transferees, either owing to their direct relationship to UMI or to their close familial or personal relationship to members of UMI's executive management, might have had

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either actual or potential access to such information as a registration statement would have disclosed, the record of sales and exchanges of common stock for value^{32/} is dotted throughout with the names of persons whose relationship with UMI and whose ability to fend for themselves could only be termed "minimal".

For example, the record shows numerous transfers of common stock to persons in exchange for their fractional interests in oil and gas properties. Certainly, it cannot seriously be contended that either the class affected or the persons who actually received the stock in that case were "partners" of UMI and that each person was sufficiently knowledgeable about the risks inherent in investing in UMI to be able to fend for himself. And, although Messrs. Nardone and Anderson were shareholders of UMI, directly or indirectly, their relationship to UMI--no stronger than the relationship to the issuer of those mentioned in the Ralston Purina case--was not such as to even raise the inference that they had the kind of access to information which the Ralston Purina case requires. Nardone and Anderson may have been "atypical" UMI investors, but the very fact that they were sold UMI common stock proves that the "class of persons affected" (even if we interpret that phrase to mean "purchasers") needed the protection of the Securities Act.

Third, defendant failed to establish that those who received UMI common stock for value either obtained automatically, or had access to, the sort of information which UMI would have

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been compelled to disclose had it filed a registration statement. Indeed, Homans admitted that he had never instructed UMI management to make such information available. Moreover, he never offered any proof of the sort of information that was routinely made available to those who expressed an interest in purchasing the stock. The investment letters which prospective transferees were asked to sign are of little support to Homans' position. They were, first of all, "form" letters drafted by UMI, and, although those who signed them acknowledged receipt of all information which they requested, there is nothing in the record to suggest that the information, if it was furnished, corresponded in kind and quality to the kind of information required under Schedule A.

Finally, there is the matter of the numbers of investors involved. Although the case law suggests that an offering to one person can constitute a public offering in certain circumstances, S.E.C. v. Ralston Purina Co., subna, 346 U.S. at 125 and n.11, it is conceivable that in certain circumstances, an offering to a small number of people might provide some basis for invocation of the Section 4(2) exemption.^{33/} In a case such as this, however, where the transferees numbered in the hundreds, the sheer size of the distribution tends to negate the assumption that no public offering was involved.

2. Defendant's Liability

Having concluded by a preponderance of the credible evi-

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dence that there was a violation of Section 5(a) of the Securities Act in connection with the sale of UMI common stock, it must next be determined whether the S.E.C. has established by a preponderance of the evidence that Homans should be held liable as an aider and abettor.

The S.E.C. alleges that the letters written by Homans, which represented either directly (Form-2 letters) or indirectly (Form-1 letters) that "the issuance of UMI common stock to which [the letters] pertained, was exempt from registration under the Securities Act," were erroneous, a fact which Homans either knew or in the exercise of reasonable care should have known. (Complaint ¶ 17).

Since Homans' liability is based upon his role as an aider and abettor and is grounded on the theory that he either knew or should have known of the illegal distributions of UMI stock which his letters furthered, this Court's inquiry must begin with S.E.C. v. Spectrum, Ltd., 489 F.2d 535 (2d Cir. 1973) and S.E.C. v. Management Dynamics, Inc., et al., No. 74-1630 (2d Cir., Mar. 18, 1975), applicable to S.E.C. enforcement proceedings such as the instant case.

The Spectrum decision, a case which is in important respects analogous to the instant one, discussed the liability under Sections 5 and 17 of the Securities Act, 15 U.S.C. §§ 77e and 77q(a), and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), of an attorney who had issued an opin-

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ion regarding the transferability without registration of certain shares of stock. The attorney's letter, submitted to a broker-dealer, indicated that the shares could be sold pursuant to Section 4(1) of the Securities Act, which exempts from registration transactions not involving an issuer, underwriter or dealer. 15 U.S.C. § 77d(1).

It is not clear whether the attorney had been placed on notice of the fact that the transaction was one which should have been accompanied by registration, 489 F.2d at 539, nor is it clear to what extent, if any, he investigated the underlying facts before rendering his opinion, *id.* It seems highly probable, however, that he was aware, either at the time he issued his opinion, or shortly thereafter, that his letter could have been used to permit the sale of stock which should have been registered, *id.* at 539-40. Additionally, it is clear that, had he made a thorough investigation of the representations given him, *i.e.*, had he exercised due diligence, he would have discovered that the transaction to which he was asked to give his imprimatur was one involving the unlawful distribution of unregistered shares by a statutory "underwriter".

After remanding the case to the district court for resolution of several material factual disputes bearing upon the attorney's knowledge and the degree of care he had used, the Spectrum court added that the standard which the district court had applied in assessing the attorney's liability as an aider

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and abettor had been incorrect. The court stated:

"In assessing liability of an aider and abettor ... the district judge formulated a requisite standard of culpability -- actual knowledge of the improper scheme plus an intent to further that scheme -- which we find to be a sharp and unjustified departure from the negligence standard which we have repeatedly held to be sufficient in the context of enforcement proceedings seeking equitable or prophylactic relief. [Citations omitted].

"We do not believe, moreover, that imposition of a negligence standard with respect to the conduct of a secondary participant is overly strict, at least in the context of this case. The legal profession plays a unique and pivotal role in the effective implementation of the securities laws. Questions of compliance with the intricate provisions of these statutes are ever present and the smooth functioning of the securities markets will be seriously disturbed if the public cannot rely on the expertise proffered by an attorney when he renders an opinion on such matters...." *Id.* at 541-42.

The Spectrum court went on to state that an attorney who prepares an opinion letter must exercise "due diligence"; in other words, he must make a "thorough investigation" or else prohibit the utilization of his letter "in the sale of unregistered securities by a statement to that effect clearly appearing on the face of the letter." *Id.* at 542.

The later decision of S.E.C. v. Management Dynamics, Inc., et al., *supra*, No. 74-1630, has clarified the Spectrum decision. Among the issues discussed there was the propriety of issuing an injunction against a broker-dealer for aiding and abetting the distribution of unregistered securities in violation of Section 5 where there had been no finding that he "knew or

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should have known that his trading activity would assist...in disposing of additional unregistered shares." Id. at 2349 (slipsheet). Harking back to its decision in the Spectrum case, the court vacated the injunction, noting:

"In Spectrum we ruled that the liability of a lawyer as an aider and abettor was to be measured by the negligence standard generally applicable to SEC injunction actions and the high degree of carelessness present there." Id. (emphasis added).

The Management Dynamics court noted that, in contradistinction to the case of the broker-dealer, the attorney in Spectrum

"could easily have concluded that the opinion letter which he issued was likely to be used to sell unregistered securities...." Id.

Amplifying that statement, the court stated:

"The crucial element of our ruling in Spectrum was that the abettor's responsibility for the alleged violation must be measured by the appropriate standard of negligence, that is, the defendant should have been able to conclude that his act was likely to be used in furtherance of illegal activity." Id. (emphasis added).

The question before this Court, therefore, is whether it is more probable than not that Homans knew, or would have known had he exercised due diligence, that his letters were likely to be used in furtherance of the illegal distribution of unregistered shares of UMI common stock.

It is clear from this Court's findings of fact that Homans' Form-1 and Form-2 letters were instrumental in furthering the distribution of UMI's unregistered stock and that Homans was well aware of this fact. (Part C-1, 3 and 4, supra).

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Whether he had direct knowledge that his letters were likely to be used in an unlawful distribution has already been discussed. (Part C-5, supra). Briefly, the Court has found that Homans had direct knowledge of the fact that his client was engaged in an illegal distribution of common stock upon conversion of the 6% debentures and for interest upon those debentures. His refusal to issue an opinion to Continental without the submission of a second opinion by Gedalecia in those instances points ineluctably to the conclusion that he knew that his opinion would be used to further those illegal distributions. As to the other distributions involved, it is clear that, had Homans exercised due diligence--had he made a thorough investigation of the representations being made to him--he would have known that the transactions upon which he was being asked to furnish an opinion for Continental also involved illegal distributions of unregistered securities. In view of the notice he had as of late 1967 or early 1968 as to the inherent problem of relying upon his client and Gedalecia, it was reckless for him not to have looked behind the representations before directing that Continental transfer the stock in question.

In concluding that Homans either knew or, under the circumstances, should have known that his acts--the rendering of letters to Continental--would be used in the furtherance of illegal distributions, the Court would only add one point. The mere fact that Homans may not have been specifically retained

OPINION OF HON. CHARLES H. TENNEY, D. J. DATED JULY 11, 1975

as UMI's securities counsel and never received separate remuneration for his securities work after October 1967 does not relieve him of liability for failing to conduct the thorough investigation required of him by the Spectrum decision. In the appropriate case, the characterization of an attorney as "corporate" or "securities" counsel might be a factor in determining liability. The distinction is of no value where, as here, the facts show that the attorney under scrutiny participates in an illegal distribution to the substantial degree involved here, i.e., the writing of opinion letters.

E. Injunctive Relief

The S.E.C. has asked that an injunction be issued pursuant to Section 21(b) of the Securities Act, 15 U.S.C. § 77t(b), enjoining Homans from any further violations of Section 5. That this Court has the power to enjoin Homans from further violations involving any security--not just UMI securities--was resolved on an earlier occasion. S.E.C. v. Manor Nursing Centers, Inc., 458 F.2d 1032, 1102-03 (2d Cir. 1972). There thus remains for determination the issue of whether an injunction prohibiting Homans from violating Section 5 of the Securities Act in the future would be proper.

Injunctive relief under the Securities Act is governed by Section 21(b), which provides in pertinent part:

"(b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts

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or practices which constitute ... a violation of the provisions of this subchapter, ... it may in its discretion, bring an action ... to enjoin such acts or practices, and upon a proper showing a permanent ... injunction ... shall be granted...." (emphasis supplied).

Since Homans is no longer connected with UMI, the question before this Court is a narrow one: whether "there is a reasonable likelihood that the wrong will be repeated", S.E.C. v. Manor Nursing Centers, Inc., supra, 458 F.2d at 1100; S.E.C. v. Management Dynamics, Inc., et al., supra, at 2340, and, where that likelihood has not been clearly demonstrated, whether injunctive relief would be appropriate under traditional equitable principles, remembering always that the public interest in S.E.C. enforcement proceedings is "paramount", S.E.C. v. Management Dynamics, Inc., et al., supra, at 2344 n.5.

Whether a future violation is "a reasonable likelihood" depends upon the "totality of circumstances", including the fact that the defendant has been found liable for illegal conduct, id. at 2340; S.E.C. v. Manor Nursing Centers, Inc., supra, 458 F.2d at 1100; the degree of scienter involved, S.E.C. v. Spectrum, Ltd., supra, 459 F.2d at 542; S.E.C. v. Manor Nursing Centers, Inc., supra, 458 F.2d at 1100-01; whether the infraction is an "isolated occurrence", S.E.C. v. Management Dynamics, Inc. et al., supra, at 2341; whether defendant continues to maintain that his past conduct was blameless, S.E.C. v. Manor Nursing Centers, Inc., supra, 458 F.2d at 1101; and whether, because of his professional

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occupation, the defendant might be in a position where future violations could be anticipated, S.E.C. v. Management Dynamics, Inc., et al., supra, at 2341; S.E.C. v. Manor Nursing Centers, Inc., supra, 453 F.2d at 1102.

Taking all of these considerations into account, the Court concludes that the S.E.C. has clearly established that there is a reasonable likelihood that defendant will commit the same or similar acts in the future. Although Homans will not have any opportunity to aid UMI management in the manner that he did in the past, his position as attorney for four other public corporations subject to the federal securities laws^{35/} and his expressed intention of continuing in the practice of securities law^{36/} mean that he will be in a position to repeat the same kinds of, or similar, acts. Additionally, the acts for which defendant has been found liable here were carried out either with knowledge or reckless disregard of the truth. Furthermore, he has been found liable not merely for a breach of duty on an isolated occasion, but for a continuous breach of duty on numerous occasions, extending over a period of some five or six years. Homans' contention that his acts were "merely careless" and that, in view of the circumstances--his relationship with UMI management and the retention of Gedalecia--his acts were quite reasonable, as well as his "ignorance"^{37/} of the most basic principles of the Securities Act, make it difficult for this Court to conclude that he now appreciates the lawyer's duties when rendering opin-

OPINION OF HON. CHARLES H. TENNEY, D. J. DATED JULY 11, 1975

ion letters, such that he would probably not repeat his mistakes.

The equitable considerations raised by defendant--most notably, the fact that he may now be subject to discipline under Rule 2(e) of the S.E.C.'s Rules of Practice, 17 C.F.R. § 201.2 (e)--are clearly outweighed by the paramount interest of the public, particularly in view of the fact that his liability is predicated upon that most "essential" of activities: the preparation of opinion letters, S.E.C. v. Spectrum, Ltd., supra, 439 F.2d at 542.

Accordingly, the Court shall issue an injunction against the defendant embodying the terms requested by the S.E.C. Submit order on ten (10) days notice.

Dated: New York, New York

July 11, 1975

CHARLES H. TENNEY

U.S.D.J.

A-177

OPINION OF HON. CHARLES H. TENNEY, D. J. DATED JULY 11, 1975

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
-against-
UNIVERSAL MAJOR INDUSTRIES CORP.,
et al.,
Defendants.

73 Civ. 3626 (CHT)

FOOTNOTES

- 1/ The corporations named were Universal Major Industries Corp., Transamerican Petroleum Corp., and Banner Oil and Gas Funds, Inc. The four other individuals named were James G. Duncan, Roy M. Horsey, Ian McCartney and Edward J. Gedalecia.
- 2/ Universal Major Industries Corp., James G. Duncan, Roy M. Horsey and Ian McCartney.
- 3/ On November 13, 1973, the Court commenced an evidentiary hearing on the S.E.C.'s motion pursuant to Fed. R. Civ. P. 65 for a preliminary injunction against Homans. The hearings continued on November 14 and December 20, 1973, and February 15 and July 24, 1974. On the last of these dates, the Court granted the S.E.C.'s previously entered motion to consolidate the hearing with the trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2).
- 4/ Brief in Support of Plaintiff's Proposed Findings of Facts and Conclusions of Law, pp. 29-36.
- 5/ Homans used the phrase "private transaction" as a term of art. See Part C-3, infra. It is clear that, by employing that phrase, he intends to suggest that the transactions in question were ones which conformed to the "private offering" exemption of Section 4(2) of the Securities Act, see Part D-1, infra.
- 6/ Actually, UMI is the successor of Universal Major Corp., which from 1954 to 1966, was primarily engaged in the distribution of automotive and electronic products. In October 1966, that corporation merged with another corporation named Inland Resources Corp., and was renamed "Universal Major Industries Corp." During the relevant period, UMI was engaged principally in the exploration and development of oil and gas property interests.

FOOTNOTES

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- 7/ In August 1971, Gedalecia terminated his relationship with UMI and Emanuel Fields, not named as a defendant in this action, was retained in his place. Gedalecia was again retained for a brief period in April and May 1972.
- 8/ Additionally, the statement was amended in September 1971, after Fields, note 7 supra, became UMI's special securities counsel. (Def. Exh. M). On July 25, 1972, Duncan requested that the S.E.C. withdraw its registration and the statement never became effective. (Transcript ["Tr."], p. 479; Pl. Exh. 2).

<u>9/</u>	<u>Type of Transaction</u>	<u>Dates</u>	<u>No. of Shares</u>	<u>No. of Transferees (*)</u>
(1)	Issuances upon conversion of debentures	5/68-2/71	1,117,078	262
(2)	Issuances for interest on debentures in lieu of cash payment	8/69-6/71	266,580	489
(3)	Issuances for cash, property, or services	1/69-12/72	839,059	94
(4)	Transfers by Horsey	9/67-2/73(**)	189,583	74
(5)	Transfers by Duncan and Transamerican	10/67-2/73(**)	807,584	95

This information is drawn from Pl. Exh. 1, which defendant repeatedly challenged as "distorted". In considering these figures (those portions of Exh. 1 which do not apply to Homans have been eliminated), two points must be kept in mind. First (*), the number of transferees does not necessarily reflect the number of different persons or entities which received UMI common stock. In other words, there may be some duplication. (Tr., p. 43). Second (**), although the sales of stock by Horsey, Duncan and Transamerican continued until February 15, 1973, it should be remembered that Homans terminated his relationship with UMI in January 1973. It seems probable, however, that the February 15, 1973 date merely represents the date when the actual sales were completed.

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- 10/ Proof that there were uncompleted offers of UMI stock may only be inferred from circumstantial evidence introduced in the course of the trial. See, e.g., Tr., pp. 366-71.
- 11/ On three occasions in 1957, Nardone had purchased shares of Inland Resources Corp. (Def. Exh. A), the company which had merged in 1966 with Universal Major Corp. See note 6, *supra*.
- 12/ Approximately one year before he purchased UMI common stock, Andersen had purchased a 1/64 participation interest in Banner Oil and Gas Funds, Inc., which was a wholly-owned subsidiary of UMI.
- 13/ It is important to note that much of Homans' testimony regarding the identity of transferees, their relationship to UMI, and the circumstances behind the transfers was apparently based upon information he obtained in preparation for defense of this suit. See, e.g., Tr., pp. 414-23.
- 14/ For example, he testified that, in one instance, he decided to invest in a concern on the basis of the number of cars in the company parking lot on the theory that the more cars that were there, the higher the company's profits. Tr., pp. 69-71.
- 15/ Tr., p. 82.
- 16/ Tr., p. 84.
- 17/ Tr., pp. 54-55.
- 18/ Tr., p. 126.
- 19/ Tr., p. 128.
- 20/ Tr., pp. 425-26, 432, 464.
- 21/ See Pl. Exh. 13, which Homans testified was prepared by Gedalecia.
- 22/ Tr., pp. 340, 341, 425-26.
- 23/ Exh. 9A.
- 24/ Tr., p. 394, 466.

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- 25/ Tr., p. 450.
- 26/ Tr., p. 364.
- 27/ See, e.g., S.E.C. v. North American Research & Development Corp., 424 F.2d 63, 71-72 (2d Cir. 1970); Gilligan, Will & Co. v. S.E.C., 267 F.2d 461, 466 (2d Cir. 1959). These decisions support the conclusion, contrary to defendant's contention, that the burden of proof in establishing the applicability of an exemption is on the party claiming the benefit of the exemption, whether or not that party is the issuer.
- 28/ Although the complaint also alleges violations of Section 5 (c), which makes it unlawful to offer to sell securities unless a registration statement has been filed, the proof on this issue was not made out by a preponderance of the evidence. The dearth of evidence offered by the S.E.C. to establish when and under what circumstances such offers were made, note 10 supra, together with the fact that UMI filed a registration statement at one point during the relevant period, note 8 supra, make it difficult for the Court to state on the basis of the evidence offered that there was a violation of Section 5(c).
- 29/ Section 3(a)(9) exempts from registration:
- "Any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange."
- That section was invoked by Gedalecia in reference to the issuances of common stock in lieu of cash interest payments and Homans sent to Continental Form-1 letters which indicated reliance upon that conclusion. Whether Section 3(a)(9) was intended to cover those transactions, as well as the transactions in which common stock was issued upon conversion of debentures which themselves had never been registered, need not be addressed since Homans has offered no statutory or decisional support for reliance upon that section. See Post-Trial Reply Memorandum of Defendant Arthur J. Homans, pp. 26-30.
- Section 4(1), which exempts from registration "transactions by any person other than an issuer, underwriter, or dealer",

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was cited by Homans in Form-2 letters as the basis for an exemption for transactions in which Horsey, Duncan and Trans-American transferred their stock to others. Although defendant argues that the S.E.C. failed to prove that the three were statutory underwriters, as defined in Section 2(11) of the Act, 15 U.S.C. § 77b(11), Post-Trial Reply Memorandum of Defendant Arthur J. Homans, pp. 21-25, he had the burden of proof on this issue, note 27 supra, a burden which he failed to meet.

30/ The question of whether securities are part of the same "issue", a matter which defendant briefs rather extensivly, arises in the context of Section 3(a)(11), the "incomplete exemption", and not, as will be seen from the discussion in the text, infra, when determining whether an exemption pursuant to Section 4(2) is available.

31/ The question as to whether Section 4(2) exempts from the registration requirements stock transferred under circumstances in which the issuer does not solicit such transfers was apparently raised and rejected in S.E.C. v. Ralston Purina Co., 346 U.S. 119, 121, 125 (1953). Moreover, it strains credulity to believe that the hundreds of transferees involved in this case would have independently "solicited" UMI common stock in exchange for their fractional interests in oil and gas properties, in lieu of cash payment on their debentures, or in payment for services rendered for UMI. It is more probable that, since UMI was suffering from a cash shortage (Tr., p. 280; Def. Exh. 1), it initiated the transactions by "suggesting" that transferees accept common stock instead of cash.

32/ See, e.g., the partial record provided by Homans. (Tr., pp. 294-319, 380-382 and Def. Exhs. J, N).

33/ See S.E.C. v. Continental Tobacco Co. of S.C., 463 F.2d 157, 158 (5th Cir. 1972).

34/ The injunctive relief which the S.E.C. requests virtually tracks the language of Section 5 of the Securities Act. See Complaint, pp. 8-9.

35/ Tr., pp. 372-76.

36/ Tr., p. 479.

37/ Tr., p. 438.

vNOTICE OF MOTION TO REOPEN HEARING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION:

Plaintiff, : 73 Civ. 3626 (CHT)

-against- :

UNIVERSAL MAJOR INDUSTRIES CORP. : NOTICE OF MOTION

JAMES G. DUNCAN

TRANSAMERICAN PETROLEUM CORPORATION:

ROY M. HORSEY

BANNER OIL AND GAS FUNDS, INC. :

IAN McCARTNEY

ARTHUR J. HOMANS

EDWARD G. GEDALECIA,

Defendants.

Moving Party: Defendant, Arthur J. Homans

Return Date, Time
and Place of Hearing: August 5, 1975.

Courtroom of Hon. Charles H. Tenney,
D.J., U. S. Courthouse, Foley Square,
New York, N. Y. 10007, or such
other date, time or place as the
court may direct.

Relief Requested:

(1) Consideration of a proposed counter-order on behalf of defendant Homans submitted in opposition to the order to be submitted for settlement by the plaintiff on the return day.

(2) An order reopening the hearing for the limited purpose set

NOTICE OF MOTION TO REOPEN HEARING

forth in the supporting affidavit
of defendant Arthur J. Homans.

Dated: New York, N. Y.
July 30, 1975.

BREWER & SOEIRO
Attorneys for Defendant Homans

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AFFIDAVIT OF ARTHUR J. HOMANS ON MOTION TO REOPEN HEARING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, :

Plaintiff, :
-against- : 73 Civ. 3626 (CHT)

UNIVERSAL MAJOR INDUSTRIES CORP. :
JAMES G. DUNCAN :
TRANSAMERICAN PETROLEUM CORPORATION :
ROY M. HORSEY :
BANNER OIL AND GAS FUNDS, INC. :
IAN McCARTNEY :
ARTHUR J. HOMANS :
EDWARD G. GEDALECIA, :
Defendants. :

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ARTHUR J. HOMANS, being duly sworn, deposes and
says:

(1) Introduction. I am the sole remaining defendant in the above-entitled action. I submit this affidavit in support of (a) my submission of a proposed form of final judgment for consideration and entry by the court, and (b) my application to reopen the trial of this matter against me solely for the purpose of introducing evidence with respect to whether or not an injunction prohibiting me from violating Section 5 of the Securities Act in the future is necessary and as to my propensity to commit any further violations in the future.

AFFIDAVIT OF ARTHUR J. HOMANS ON MOTION TO REOPEN HEARING

(2) Reasons why the proposed judgment submitted by me should be accepted by the court. I respectfully submit that the proposed form of final judgment of permanent injunction submitted on my behalf satisfies all of the concerns and prophylactic purposes reflected in the court's opinion dated July 11, 1975, and should be accepted by the court for execution and entry.

(a) In its opinion the court has expressed appropriate concern that the nature of the arguments put forth in my defense at and in connection with the trial of this action provide the court in the present record with no assurance (i) that I now "appreciate...the lawyers' duties when rendering opinion letters" as indicated by recent court decisions and SEC rulings or (ii).that the procedures used by me in connection with the rendering of "private placement" opinions in the future will be reasonably calculated to preclude such failures of factual knowledge and lapses of professional judgment (negligent or reckless) as the court has found to have been indicated by the record herein.

(b) I respectfully submit that I do, indeed, appreciate fully the nature of an attorney's duties imposed by the federal securities laws in connection with rendering opinions concerning the meaning or application of those laws. I have done appropriate study and research on that

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subject. I have discussed the matter at length with my attorney in this action, who is fully familiar with those statutes and the duties imposed by them. Based upon the foregoing, I have revised the procedures employed in my office in connection with securities law opinions and have incorporated in the proposed form of judgment submitted to the court on my behalf express provisions reflecting and requiring the use of such procedures by me for the indefinite future.

(c) An examination of my proposed judgment will disclose that all of the defects or possible defects cited in the court's opinion in the procedures involved on my part in issuing the letters involved in this action have been considered and corrected in formulating the revised procedures incorporated in the proposed judgment. Mechanisms have been provided to insure that the information required by Schedule A has been given to and actually read and understood by each offeree and purchaser. An affidavit of pertinent information is required from the issuer covering each opinion. It is required that personal contact be made by me with the offeree and the communication be recorded in writing. Stop orders, appropriate legends, and receipt of a revised form of investment letter will be required. In addition, each opinion and its supporting file will be reviewed prior to issuance and approved by a supervising

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attorney acceptable to the court and to the SEC

(3) Reasons why my application to reopen the hearing should be granted.

(a) The Court's finding that "there is a reasonable likelihood that defendant will commit the same or similar acts in the future" is also premised, in part, upon the fact that I was, during the trial, the attorney for four other public corporations subject to the federal securities laws and my expressed intention to continue in the practice of securities law. The court concluded, therefore, that I "will be in a position to repeat the same kinds of, or similar, acts."

(b) While it is correct that I did testify that I represented four other public corporations, I also testified to the minimal number of opinions rendered in connection with those four corporations and to the circumstances under which such opinions had been rendered. The court in its findings and in its opinion apparently gave little weight to such testimony as mitigating or eliminating the possible propensity for the commission of future acts. I respectfully submit that it is relevant to the matter of whether or not an injunction should issue, in the broad form submitted by the plaintiff, to review my activities in the rendering of opinions and the changes in my practice in representing public corporations.

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(c) Since my hospitalization on July 1, 1973, my legal practice in representing public corporations has dramatically declined. Furthermore, my activities in rendering opinions have likewise been dramatically reduced. Following is a recapitulation of all opinions rendered by me for any of the four corporations which I testified on the trial that I then represented:

(i) Pan-American Dynamic Corp. While I still represent this corporation, I have not rendered a single opinion with reference to the issuance or transfer of the corporation's stock in any way. On February 3, 1975 and February 21, 1975, the Board of Directors of the corporation authorized the retirement of certain outstanding stock which it held as treasury stock to the status of authorized but unissued shares, and in this connection I issued an instruction letter (not an opinion) accompanied by a secretary's certificate of corporate resolution to the transfer agent authorizing such action.

(ii) Automated Procedures Corp. Since July 1, 1973, I have not rendered a single opinion for this corporation relating to the original issue of stock or the transfer of stock. This corporation is presently engaged in a transaction in which it will be acquired by another corporation which will be the surviving corporation and which will result in the termination of existence of Automated Procedures Corp. In consequence of the consummation of such

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transaction, I will no longer represent Automated since the surviving corporation will be represented by other counsel.

(iii) GBC Closed Circuit TV Corp. I still represent this corporation of which I remain a director. The only opinions rendered by me since July 1, 1973 relate to the following:

(A) On December 28, 1973, the principal stockholder, Chairman of the Board and President of GBC acquired in a private purchase 60,600 shares of stock from the other principal stockholder who thereupon retired from the corporation. I issued an opinion with respect to this transfer instructing that the shares issued to the purchasing principal stockholder be properly restrictively legended and a "stop transfer" placed on the transfer agent's record.

(B) On January 3, 1974, I issued an opinion concerning the issuance of 22,000 shares of common stock under a Restricted Executive Stock Plan which had been approved by shareholders at an annual meeting to six key executives and four close associates (including myself) of the corporation. The certificates were duly legended, restrictively, and a "stop transfer" order placed on the transfer agent's record. Furthermore, the certificates bore a special legend because under the Plan the corporation had the right to repurchase under certain circumstances, such as termination of the employment of the executive.

(C) On September 30, 1975, I issued an opinion with reference to a 10% stock dividend declared by

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GBC and in such opinion instructed the transfer agent that public shareholders may receive their dividend shares free of restriction and that restricted shareholders receive their shares with the same restriction as contained on their original holdings.

(iv) Brentwood Industries, Inc.
(A) As of February 1, 1975, my connection with Brentwood as counsel and an officer and director was completely terminated when the surviving controlling group selected new counsel.

(B) On November 16, 1973, I issued an opinion with respect to a transfer of 6,623 shares from the President to an executive of one of the corporation's subsidiaries in Hong Kong. The shares issued were restrictively legended and a stop transfer recorded.

(C) On December 21, 1973, an opinion with regard to the transfer of 28,000 shares from the President and his wife to various children and grandchildren as year end gifts. The shares reissued to the donees were all restrictively legended and stop transfers placed of record.

(D) On January 17, 1974, an opinion with respect to the transfer of 3000 shares from a stockholder to a trustee for a member of his family, an inter-family transaction. The shares issued were restrictively legended and a stop transfer noted.

(E) On March 15, 1974, an opinion regarding the transfer of 6000 shares in an inter-family transaction. The shares issued were restrictively legended and stop

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transfer noted.

(F) On May 13, 1974, I issued an opinion covering the issuance of 329,363 shares to the President of the corporation in consideration of his surrendering notes of the corporation and a subsidiary in the amount of \$2,470,225.20, a transaction which was approved by the Board of Directors. As part of the same transaction, the President re-transferred to the corporation 168,617 shares in liquidation of an obligation owed by him in the amount of \$252,925 to one of the subsidiaries, which transaction was likewise approved by the Board of Directors and which shares were subsequently retired and restored to the status of authorized but unissued shares.

(G) On May 13, 1974, an opinion with respect to the transfer by the President to the Chairman of the Board and Chief Executive Officer of the corporation of 80,373 shares, out of the 329,363 shares received by him, in liquidation of a personal obligation to the Chairman of the Board and Chief Executive Officer.

(H) On January 13, 1975, a change in control of Brentwood was consummated. The former Chairman and Chief Executive Officer retired from the corporation and surrendered all of the shares of stock owned by him and his wife as a contribution to the capital of the corporation consisting of 839,868 shares and which were thereby retired. At the same time other members of the Chairman's family transferred

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a total of 564,114 shares for a consideration of 1¢ per share to a trust established for the minor children of the surviving principal stockholder who took over control after retirement of the Chairman and Chief Executive Officer. The certificate issued to the Trustee was restrictively legended and a stop transfer order placed against it.

(d) As can be seen from the foregoing, any propensity which there might be for ~~any~~ possible future violations is de minimis, and as a result of the attrition reported above, I have lost one of my principal public corporation clients and am about to lose a second.

(e) At the age of 70 years and in my present condition of health in which I am reducing my activity (although I intend to continue to practice law so long as my health permits) it is extremely unlikely that I can acquire any additional public corporate clients to replace those who have left me. Furthermore, attrition in my practice has occurred in other directions, namely, with the death of contemporaries who have been clients of long standing and whose sons or relatives or younger executives have succeeded to the business, such successors have in the past designated counsel of their own generation.

(f) Under the circumstances above disclosed, for which I would like the opportunity to present evidence on a

AFFIDAVIT OF ARTHUR J. HOMANS ON MOTION TO REOPEN HEARING

reopened hearing, I respectfully submit that the remedy of a naked injunction as proposed by the SEC is far too harsh a sanction to impose. There is, obviously, as a result of the mandatory procedures set forth in the proposed judgment submitted on my behalf and of the minimal nature of the practice on my part likely to be covered thereby, no significant public interest involved in enjoining me except as set forth in my proposed form of injunction.

s/

Arthur J. Homans

Sworn to before me this

20 day of July, 1975.

WVH

WILLIAM V. HOMANS
NOTARY PUBLIC State of New York
No. 31-695250
Qualified in New York County
Commission Expires March 30, 1976

PROPOSED COUNTER JUDGMENT SUBMITTED BY DEFENDANT HOMANS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,:

Plaintiff, :

-against- :

73 Civ. 3626 (CHT)

UNIVERSAL MAJOR INDUSTRIES CORP. :
JAMES G. DUNCAN
TRANSAMERICAN PETROLEUM CORPORATION:
ROY M. HORSEY
BANNER OIL AND GAS FUNDS, INC. :
IAN McCARTNEY
ARTHUR J. HOMANS
EDWARD G. GEDALECIA,

FINAL JUDGMENT OF
PERMANENT INJUNCTION

Defendants. :

Plaintiff Securities and Exchange Commission ("Commission") having filed its Complaint and all other papers in this action, and this Court having jurisdiction of the parties and of the subject matter of this action, and after an evidentiary hearing on a motion for a preliminary injunction having been consolidated, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, with a trial on the merits, and such trial having been concluded, and this Court having rendered its Opinion, dated July 11, 1975, which constitutes this Court's Findings of Fact and Conclusions of Law, as required by Rule 52 of the Federal Rules of Civil Procedure, in which it was found that permanent injunctive relief is appropriate against the defendant Arthur J. Homans, it is hereby

PROPOSED COUNTER JUDGMENT SUBMITTED BY DEFENDANT HOMANS

ORDERED, ADJUDGED AND DECREED that defendant Arthur J.

Homans be and is hereby permanently enjoined from, directly or indirectly, in the absence of any applicable statutory exemption, violating, or aiding and abetting the violation of, Section 5(a) of the Securities Act of 1933, 15 U.S.C. 77e(a), by writing, furnishing or rendering opinions as to the availability of any applicable statutory exemption; and

FURTHER ORDERED, ADJUDGED AND DECREED that

(1) Prior to the issuance of any such opinion or opinions, each of the following steps shall be completed:

(a) Defendant shall deliver to the client or person contemplating the sale or distribution of any unregistered securities ("offeror") a memorandum (i) setting forth the information that must be disclosed to each offeree and purchaser ("offeree") and (ii) advising that such information must be disclosed in a written private placement memorandum delivered to each offeree or purchaser prior to completion of the transaction with him. The information (in the private placement memorandum) shall include substantially the information required by Schedule A to SEC Form S-1.

(b) Defendant shall obtain from the offeror or an officer thereof an affidavit stating each of the following:

(i) A private placement memorandum in form acceptable to the defendant and attached to the affidavit was delivered to the offeree, and the offeree was advised to

PROPOSED COUNTER JUDGMENT SUBMITTED BY DEFENDANT HOMANS

consider its contents carefully;

(ii) The total number of offerees (including the present one) to whom offers under the subject offering have been made to date by the offeror, and the total number of acceptances or purchases to date; and

(iii) The relationship of each offeree to the offeror, including whether or not the offeree has access on a personal and informal basis to financial information concerning the offeror and, if so, the nature of such access.

(c) Defendant shall make personal contact with the offeree, either in person or by means of a telephone conversation, and thereby confirm facts known to the offeree and set forth in the affidavit of the offeror to defendant. In particular, defendant shall confirm that the offeree has received and actually read the private placement memorandum. Defendant shall set forth the facts concerning such information in a memorandum for his files.

(d) Defendant shall instruct the transfer agent to place an appropriate legend on the certificates to be issued restricting further transfer and to place an investment stop on the transfer agent's records and shall also require the offeree-purchaser to sign an investment letter acknowledging receipt of the private placement memorandum and that the securities are acquired for investment and not for public sale or distribution.

PROPOSED COUNTER JUDGMENT SUBMITTED BY DEFENDANT HOMANS

(e) Defendant shall submit his entire file concerning the proposed opinion (including the defendant's proposed opinion letter and all documents required above) for written approval to an attorney acceptable to and approved by the SEC. The written approval of the reviewing attorney shall be included in the defendant's file of the matter.

(f) Defendant shall submit to the New York Regional Office of the SEC periodic written reports of all opinions covered by this judgment. Such reports shall be in form acceptable to that office and shall be filed at intervals similarly acceptable to it.

(g) Defendant shall (i) retain all files covered by this judgment until such time as the SEC shall indicate to him in writing that their retention is no longer required, and (ii) make such files available for inspection by representatives of the SEC upon reasonable notice and during normal business hours.

(2) The court retains jurisdiction over this cause for the purpose of entering from time to time such orders as may be appropriate. After the expiration of one year from the date of entry of this judgment, defendant may apply to the court upon 20 days' prior notice to the SEC for a supplemental or amended judgment vacating the requirements of subparagraphs (1)(e) and (1)(f) above, or either of them,

PROPOSED COUNTER JUDGMENT SUBMITTED BY DEFENDANT HOMANS

upon a showing of full compliance with the terms of this judgment.

United States District Judge

Dated: New York, New York
August , 1975

JUDGMENT ENTERED

CLERK

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1 mdsr
 2 UNITED STATES DISTRICT COURT
 3 SOUTHERN DISTRICT OF NEW YORK
 4 -----x
 5 SECURITIES AND EXCHANGE :
 6 COMMISSION, :
 7 Plaintiff, :
 8 - v s - : 73 Civ. 3626
 9 ARTHUR J. HOMANS, :
 10 Defendant. :
 11 -----x
 12 Before :
 13 • HON. CHARLES H. TENNEY,
 14 District Judge.

15 New York, N. Y.
 16 August 12, 1975 - 11:30 a.m.

17 Appearances :

18 S. JART PERLMUTTER, ESQ.,
 19 RALPH PERNICK, ESQ.,
 Attorneys, Securities and
 Exchange Commission.

20 BRADLEY R. BREWER, ESQ.,
 21 Attorney for Defendant.

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 2 [Case called.]
 3 MR. BREWER: Good morning, your Honor.
 4 As the Court is of course aware, defendant Arthur
 5 Homans has moved after rendering of the Court's opinion in
 6 connection with the submission of a proposed counter-judgment
 7 on his behalf for consideration of his proposed counter -
 8 judgment and for a discretionary ruling by the Court opening
 9 the record, not for the purpose of re-arguing or asking
 10 reconsideration of the Court's decision, but for the purpose
 11 of clarifying the record on certain limited points that
 12 relate to the proposed form of judgment and to the neces-
 13 sity for the relief.

14 The Court has rendered its decision on liability,
 15 and stated certain reasons based upon the record presently
 16 before the Court which it has indicated as a basis for
 17 justifying the issuance of an injunction. I frankly do not
 18 think that there is any point based upon the Court's opinion
 19 in arguing on behalf of Mr. Homans, again, as I have in the
 20 past, an injunction is not necessary. The Court has seen
 21 it otherwise. I don't seek to change the Court's opinion.
 22 I do seek to supplement the record with respect to the state
 23 of Mr. Homans' mind, with respect to the question of whether
 24 he does at this point understand an attorney's duties in
 25 connection with the rendering of opinions, and in connection --

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2 THE COURT: I will assume that he does.

3 MR. BREWER: -- in connection with practice. The
4 SEC has not opposed our request for an opportunity to let
5 Mr. Homans make a statement on the record concerning tha .6 THE COURT: Some day this case has to come to
7 a close.

8 MR. BREWER: I know that, your Honor.

9 THE COURT: If he wants to make a brief statement,
10 that's all right with me.11 MR. BREWER: We are not trying to delay, your
12 Honor.13 THE COURT: A proposed judgment has been sub-
14 mitted by the Commission here. It seems to me that enjoins
15 him from acting in violation of aiding and abetting the
16 violation of the Securities Act.17 Now, when you submit to me proposed alternatives
18 I get the impression that he wants to violate the Securities
19 Act .20 After all, isn't this all covered? He can do all
21 the things. Why this? Why these additional provisions?

22 MR. BREWER: For one thing, your Honor --

23 THE COURT: They are suspect in my mind.

24 MR. BREWER: I don't understand why we should --

25 THE COURT: He is being enjoined for violating

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2 the law. Instead of that, he wants to substitute all
3 these other provisions.4 MR. BREWER: I would only say three things, your
5 Honor. One, we have no ulterior purpose. Our purposes have
6 been stated openly and to the Court. You say that what we
7 are doing is suspect. I don't have any reason other than
8 the ones I have stated.9 THE COURT: I don't appreciate the necessity for
10 it.11 MR. BREWER: I would respectfully submit that
12 the injunction against violating the securities laws in all
13 respects goes beyond the scope of the proof in this case
14 which was ~~only~~ not that Mr. Homans has committed a broad
15 spectrum of securities violations, but only that he issued
16 opinions which the Court has found to be in violation. So
17 one thing our proposed order does is to limit the proposed
18 injunction to the rendering of opinions in violation of the
19 law, and I think that's appropriate in that it is limited
20 to the scope of the of the suit and to the scope of the
21 potential violations the Court has concluded might happen.22 The other part of the order that we have proposed
23 in substitution directs itself to certain corrective pro-
24 cedures that Mr. Homans proposes voluntarily to implement
25 as an indication of his state of mind and of his good faith

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2 *in*
 3 of certain problem areas that the Court has pointed out
 4 in his practice. It is simply an effort on the part of
 5 Mr. Homans to show he recognizes what the Court has said
 6 and what the recent cases have held, and what the current
 7 standards of practice are. He wants the record to reflect
 8 that because he is a diligent lawyer who has practiced for
 9 45 years, and wants the record to show that while the
 10 Court's decision is -- I wouldn't want to preclude myself
 11 from subsequent courses of action, but the Court's decision
 12 is based upon the record as it is *his promise*, and I would
 13 ask the Court -- I don't think there is any opposition from
 14 the SEC -- simply to allow Mr. Homans to make a statement
 15 briefly on the record.

16 THE COURT: He can make a statement.

17 MR. HOMANS: If it please the Court, I still
 18 consider myself under oath as a defendant in this case.

19 THE COURT: Very well.

20 MR. HOMANS: I have made an affidavit which
 21 has been submitted with my motion with relation to the
 22 dramatically reduced practice which I am now engaged in in
 23 reference to securities law, and the fact that the practice
 24 is subject to further attrition in respect to the loss of
 25 another of the four securities clients which the Court has
 adverted to in its opinion.

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2 I now wish to state that I have reread the SEC
 3 against Ralston Purina, 346 U.S. 119, in the light of the
 4 Court's interpretation of that decision. While the Supreme
 5 Court declined to lay down a numerical standard of offerees
 6 or purchasers which make this difference between a public
 7 or non-public offering it would enunciate the rule that
 8 private purchasers must have access to the same type of
 9 information as would be called for in a registration state-
 10 ment and particularly that class and type of purchasers
 11 in Ralston Purina needed the protection of the Act. That
 12 was one of the points which was emphasized by your Honor
 13 in his opinion.

14 In SEC against Continental Tobacco Company, 463
 15 Fed. 2nd, 137, the Fifth Circuit case in 1972 also referred
 16 to in the Court's opinion was the first case which in
 17 following Ralston Purina as to type of purchase needing
 18 the protection of the Act also adverted to a numerical
 19 standard as well as to the haphazard method of holding
 20 meetings, lack of financial information and general solici-
 21 tation of offerees.

22 Then there have been another series of cases in
 23 Hill-York Corporation against American International Fran-
 24 chises, 448 Fed. 2nd 680, a Fifth Circuit case, Wolf against
 25 S. D. Coehn & Company, a rescission case in 1975, Fifth

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2 Circuit, and Lively against Hershfield, a Tenth Circuit case
 3 involving rescission.

4 However, in 1974, the SEC for the first time
 5 promulgated in Rule 146 objective standards for a private
 6 placement of securities, and for the first time provided a
 7 numerical limitation on such private offerings.

8 I submit that both Continental Tobacco and Rule
 9 146 were respectively decided and promulgated at a time
 10 subsequent to the activities complained of and actually at
 11 a time when my activities complained of had all been but
 12 ceased.

12 MR. PERLMUTTER: Your Honor, I don't mean to in-
 14 terrupt Mr. Homans, but I was under the impression Mr. Homans
 15 was going to address himself to the Court as to the need
 16 for the injunction rather than going into the state of the
 17 law.

18 MR. HOMANS: I am.

19 MR. BREWER: This is not an attempt to persuade
 20 the Court as to the state of the law, It is an attempt to
 21 reflect Mr. Homans' understanding of the cases, and the
 22 duties imposed by them upon as attorney, because even after
 23 the Court's injunction, whichever form it takes, Mr. Homans
 24 will still be in a position to render his opinions for some
 25 period of time. We want to assure the Court on the record

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2 that while its concerns may be well founded to protect the
 3 public interest, Mr. Homans himself as a responsible prac-
 4 titioner has undertaken to make corrections indicated by
 5 the Court's opinion. The purpose is not to make an argument
 6 of law, it is a statement of Mr. Homans' understanding
 7 of the law which the Court has indicated was lacking.

8 THE COURT: It is too late for re-argument
 9 anyway.

10 MR. BREWER: We are not trying to re-argue.

11 MR. HOMANS: SEC against Spectrum, Limited,
 12 489 Fed. 2nd 535 in this Second Circuit in 1973 was decided
 13 subsequent to the cessation of my activities for UMI. It
 14 was, I believe, the first case decided by any Appeals Court
 15 which enunciated a standard of professional ^{professional} provisional liability for
 16 negligence of an attorney in issuing opinions.

17 I have reread the Spectrum decision and also
 18 the Management Dynamics 1975 decision, and realized that
 19 attorneys are now held to a high degree of care in investi-
 20 gating the circumstances of each transaction for which an
 21 opinion is requested.

22 In addition to the study of these leading
 23 cases and others I have studied, two current treatises
 24 on private placements and sales of securities by corporate
 25 insiders. The first a monograph constituting a constituting

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2 handbook issued by the Practicing Law Institute, of which
 3 I am a member, edited by Krauss Eppler, and the second a
 4 treatise written by Robert L. Fromm and Victor Rosensweig
 5 likewise published by Practicing Law Institute, as well as
 6 other secondary sources such as Soward's Security Regulation.

7 The Eppler monograph sets out in considerable
 8 detail procedures to be followed under Rule 146, with
 9 tabulations to attract the offerees, the purchasers, the
 10 contact, the private placement memorandum, the personal
 11 contact and followup by counsel, the form in detail of the
 12 opinion letter and the exhibits to be made part of such
 13 letter. Also, a complete closing check list for counsel to
 14 follow at closing the transaction.

15 The Fromm-Rosensweig treatise is directed more
 16 towards the requirement of sales by corporate insiders,
 17 which was involved in sales by Corsi & Duncan in this case, as
 18 distinguished from the corporation itself as an issuer.

19 The treatise also studies the impact of Rule 146
 20 in depth, and treats a sale or sales by a corporate insider
 21 as in effect a private placement. The treatise also lays
 22 down ground rules for such transactions and elaborates
 23 suggested procedures, check lists and details, to assure
 24 compliance with the rule. The treatise also re-elaborates
 25 on sales under Rule 144 by holders of restricted shares

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2 outlining the procedures as well as the numerical limitations
 3 as to the number of shares which may be sold periodically
 4 under the Rule.

5 I have studied the recommended model procedures
 6 described in both texts and I intend to make them my bible
 7 and follow them carefully and to the letter in all subse-
 8 quent transactions involving the sale of unregistered shares
 9 and the application of any exemption from registration as
 10 enunciated by these rules.

11 I now have an understanding of the attorney's
 12 duties in issuing opinion letters consonant with Judge
 13 Tenney's opinion. However, I wish to point out that this
 14 action and the recent cases and regulations have changed and
 15 clarified earlier concepts. Many of them have come up
 16 after the substantive events in this case; for example,
 17 Spectrum Management Dynamics, Continental Tobacco. These
 18 new concepts had not been previously established by SEC
 19 regulations. The specific adoption of Rule 146 regulating
 20 private placements provided objective standards which
 21 clarified and interpreted and generalized and unclear
 22 holding of Ralston Purina.

23 In view of the trend in the recent cases following
 24 Ralston Purina and of the Court in its decision in this
 25 case I can assure the Court that the act complained of

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2 will not recur, and that my activities will follow strictly
 3 the lines set out in the cases and text and their outlines
 4 of recommended procedures.

5 As a tangible demonstration of this intention,
 6 and changes in my methods of practice involving securities
 7 opinions, I have voluntarily incorporated in a proposed
 8 judgment specific requirements mandating the new methods and
 9 procedures I intend to employ in my practice hereafter.

10 Thank you, sir.

11 MR. PERLMUTTER: Your Honor, we request that the
 12 Court sign the judgment that the Commission has proposed.
 13 Contrary to what Mr. Brewer has stated, the injunction that
 14 we propose is not broader in scope than the Court's opinion.
 15 The injunction applies only to violations of Section 5A of
 16 the Securities Act of 1933 and not the entire body of
 17 securities laws.

18 THE COURT: I am aware of that.

19 MR. PERLMUTTER: Your Honor, the --

20 THE COURT: I certainly have no objection to Mr.
 21 Romans following the procedures that he has outlined.

22 MR. PERLMUTTER: We would have no objection to
 23 his following the procedures, either, but outside, not to
 24 be encompassed with a Court order, as to procedures that
 25 he wants to follow. We feel that the procedures that he

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2 has enumerated do not cover all instances in which the
 3 Section 4.2 exemption which would be available which would
 4 create a problem in the event those procedures were followed
 5 and then an action was to be brought of a violation of
 6 Section 5. The defense would be: "I was following
 7 Court-approved procedures." It is exactly the problem we
 8 want to avoid to have such a contention being made somewhere
 9 down the line, that an individual followed procedures that
 10 were ordered by a Court and yet those procedures do not
 11 satisfy Section 4.2.

12 If I may briefly state some of the instances
 13 where I feel those procedures do not conform with Section
 14 4.2, nowhere is there stated in the procedures that the
 15 offeree or the purchaser of securities will be an individ-
 16 dual who has the ability to fend for himself, citing from
 17 the Ralston Purina Case. I think that is an extremely impor-
 18 tant criterion to determine the Section 4.2 exemption.

19 While there is a section in the revised judgment
 20 by the defendant as to the individuals, the offerees and
 21 purchasers having access to information, it requires more
 22 than access to information; it requires that these indi-
 23 viduals be of the type that are able to have the economic
 24 bargaining leverage that they can fend for themselves.
 25 The order by the defendant is silent on that.